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In a striking manner a decision of the United States Supreme Court, recently rendered, illustrates how judges may disagree in their construction of treaties and laws. Four of the five judges of the court of claims sustained in a sweeping way the claim of the Choctaw and Chickasaw Indians to an interest in the 7,500,000 acres of land ceded a third of a century ago. All nine justices of the supreme court now take a view precisely opposite and reverse the conclusions of the court of claims. The case involved between $4,000,000 and $5,000,000. It was argued in both courts exhaustively. The court of claims gave over a week to the hearing, and the supreme court sat three days listening to the lawyers.

The United States District Court for the Eastern District of Missouri has held, In the Matter of McCauley *et al.*, that where bankrupts, as agents for a claimant creditor, guaranteed certain notes to the creditor under a contract in the following terms: "We hereby guarantee payment of the within note and interest at maturity" etc., and none of the notes so guaranteed by the bankrupts and presented by the claimant creditors were due and payable at the date of the adjudication, the claims on those notes could not be allowed for the reason that they were not debts absolutely owing by the bankrupts at the date of the adjudication, and that where the claimant creditor held several notes guaranteed by the bankrupts, and offered in proof of the claims, not the notes themselves, but a list giving the date, the amount, the date of maturity and the names of the makers, the failure of the claimant to file the original notes with his proof was in itself sufficent bar to their allowance.

The recent decision of the Supreme Court of the United States, in the case of Workman v. City of New York, affords a striking instance of difference of opinion of jurists upon points of law. The case involved the liability of a municipal corporation for damages resulting from the action of its fire authorities. It arose out of damages done by a New York city fireboat to a British barkentine during a fire at a wharf in the East river some years ago. The United States District Court held the city liable, but its judgment was reversed by the Circuit Court of Appeals for the Second Circuit. The latter decision, in turn, has been reversed by the Supreme Court of the United States in a judgment rendered by a majority of one.

It was admitted, in the opinion handed down by the majority of the court, that there was no doubt that under the decisions of the New York State courts a municipality is not liable for damages inflicted by its servants in such an emergency as that of a fire, but it was held that, whatever the doctrine held by the State courts, the rule in question could not be applied in an admiralty proceeding. In the maritime law, the court said, the public nature of the service upon which a vessel was engaged at the time of the commission of a maritime tort afforded no immunity from liability in a court of admiralty where the court had jurisdiction. This being so, it followed that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case, because of the public nature of the business upon which the court was engaged, was without foundation in maritime law, and, therefore, afforded no reason for denying redress in a court of admiralty for the wrong which the court below found to have been committed.

NOTES OF IMPORTANT DECISIONS.

CARRIERS OF PASSENGERS—THREATENED COLLISION—CONTRIBUTORY NEGLIGENCE.—In Green v. Pacific Lumber Co., 62 Pac. Rep. 747, decided by the Supreme Court of California, it was held that whether a passenger on a train, who, when a collision with another train seemed certain, jumped from the car, and, falling face downward on the track, where danger from the cars still threatened her, rolled from the track, and in doing so was carried down an embankment, was guilty of contributory negligence, was a question for the jury.

It was further held that the allegation of a complaint that plaintiff, a passenger on a train, in her effort to escape the danger of a threatened collision, "was thrown on the track and injured,"

is supported by evidence that she jumped from the train, and, falling face down on the track, where danger from the cars still threatened her, she rolled from the track and down an embankment, as all this may be grouped as a single act, especially where it went to the jury without objection that it was not within the pleadings. The court said, in part:

"This is an action to recover damages for personal injuries. Defendant appeals from the judgment and order denying a motion for a new trial. Defendant was engaged in the lumber business and in connection therewith operated a railroad. Plaintiff was a passenger upon this railroad, traveling from the town of Scotia to Alton. The railroad was a single-track road, and between these two points, while the train was going at the rate of eight or ten miles an hour, an approaching freight train disclosed itself in front, a few hundred feet distant, as it emerged from around a curve. A collision seemed certain and the plaintiff, as well as others upon the train, escaped therefrom to the ground. In her efforts to escape the threatened danger she jumped or stepped from the train, fell upon the track, and rolled down an embankment, suffering great personal injuries. Various questions are raised by this appeal upon the giving and refusing of certain instructions as to the law, and some rulings upon the admission and rejection of evidence are also assailed. It may be conceded that when the defendant attempted to operate two trains upon a single track at the same place and time, traveling in opposite directions, it was guilty of gross negligence. But defendant now insists that plaintiff was guilty of contributory negligence—First, in this: That if she had not jumped from the train she would not have been injured, and, *ergo*, she should not have jumped; and, second, that, after having jumped, she should not have fallen and rolled down the embankment. When a passenger upon one railroad train observes a second train upon the same track a few hundred feet distant, the two trains rapidly approaching each other, danger is right at his elbow, and it behooves him to do something, and do it quickly. There is no time to enter into mental calculations, mathematical or otherwise, as to whether or not it is best to stand your ground, and trust to some avertment of the collision, or, upon the contrary, to escape from the scene of the danger at the quickest possible moment.' And the law recognizes that under these circumstances a man may do the wrong thing, his act thereby resulting in an injury to himself, and yet not be held guilty of contributory negligence. This principle of law may be thus stated: 'If a railroad company so operates its trains as to place its passengers in situations apparently so dangerous and hazardous as to create in their minds a reasonable apprehension of peril and injury, and thereby excite their alarm and induce them to make efforts to escape, and if in such efforts to escape they receive personal injuries, it is responsible in damages for its negligence.' Under the circumstances of this case, tested by this principle of law, it was essentially a question of fact for the jury as to whether or not plaintiff was justified, in view of all the surounding conditions, in jumping from the train.

The same principle of law may be invoked upon the second contention made as to contributory negligence. If the danger of collision is hanging right over a passenger's head, the proprieties and niceties usually demanded of passengers in alighting from trains certainly need not be observed to their full extent. Under those circumstances a person does not stand and ponder upon the order of his going, but goes at once. A safe or unsafe spot may be chosen upon which to alight from the cars. If the spot be unsafe and dangerous, that fact, of itself, will not necessarily defeat a right of recovery, even though a safe and secure spot was at hand, and equally ready of access. The plaintiff testifies that in jumping from the train she fell upon the track face downward; that danger still threatened her there, as the cars were liable to pass over her, and in rolling from the track she was carried down the embankment. Certainly this court will not hold, as a matter of law, that her acts, under the circumstances detailed, amount to contributory negligence."

CONVERSION — WHAT CONSTITUTES—DEFENSE —DAMAGES.—In Cernahan v. Chrisler, 83 N. W. Rep. 778, it appeared that plaintiff purchased a horse and buggy from a widow who delivered the property at a certain livery stable. The widow having run away, leaving her children, their uncle took charge of them, and came to town to get any property she might have left. Defendant, who was undersheriff, having discovered the horse and buggy at the stable, where plaintiff had not yet demanded them, directed those in charge not to allow any one to remove them, and returned with the uncle, and directed that the property be delivered to him, which was done. Defendant was ignorant of plaintiff's ownership, and later had the property redelivered to plaintiff. It was held that he was guilty of conversion. It was also held that where plaintiff sued for the conversion of certain goods, which were returned to and accepted by him pending trial, and no special damages were shown, such return is not a defense to the whole cause of action, and plaintiff is still entitled to nominal damages; and where, in an action for conversion, the property is returned to and accepted by plaintiff pending trial, defendant may protect himself from further costs by tendering plaintiff nominal damages and costs to date. The court said:

"1. We will first inquire what acts of a party constitute a conversion. Perhaps as terse a definition as can be found in the books is given in Cooley, Torts (2d Ed.), 524. The learned author says: 'Any distinct act of dominion wrongfully exercised over one's property in de-

nial of his right, or inconsistent with it, is a conversion.' It is not necessary that there should be a manual taking, or that it should be shown that he applied it to his own use. The test is, does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights? If he does, that, in law, is conversion, be it for his own or another person's use. Neither is it any defense to say that he acted as agent. 'But one who assists in a wrongful taking of goods is liable, though he acted as agent merely, for agency cannot be recognized as a protection in wrongs.' *Id.* 529. Neither is the motive which controlled the party available as a defense, except, in cases where exemplary damages are claimed, it may be shown in mitigation. Railroad Co. v. O'Donnell (Ohio Sup.), 32 N. E. Rep. 476, 21 L. R. A. 117; Tobin v. Deal, 60 Wis. 87, 18 N. W. Rep. 634. In view of these rules, it seems entirely unnecessary to discuss the evidence. The defendant clearly exercised dominion over the plaintiff's property in defiance of his rights. It does not serve to excuse him that he was ignorant of plaintiff's title, or supposed title was in Mrs. Lowe, or that he was acting in the interest of Mr. Lowe. We say, therefore, that there is evidence to support the plaintiff's cause of action.

"2. After this suit was commenced the plaintiff took possession of the property, and it is now claimed by defendant that he waived his right to further prosecute his action. We are referred to Collins v. Lowry, 78 Wis. 329, 47 N. W. Rep. 612, as an authority sustaining that proposition. This was an action for the conversion of certain shares of stock. Pending the action the defendant brought such shares into court and tendered them to plaintiff. At the trial plaintiff announced his readiness to accept the stock, and thereupon introduced the stock certificate in evidence. He claimed also the right to recover damages for his time, trouble, and expense in attempting to secure a return of the stock. The court directed a verdict for nominal damages. The recovery being less than $50, judgment for costs was entered for defendant. In this court the plaintiff insisted that he was entitled to recover for his expenses, etc. In denying a recovery under the circumstances, the following language was used: 'The theory of the case is that the defendant is only answerable for the value of the property, and that he or his vendee or transferee is to be regarded as the owner. Such being the nature of the action, a verdict for the value of the property converted necessarily covers and includes the damages for such conversion, and the acceptance by the plaintiff of the thing converted necessarily covers and includes its value, and hence such acceptance extinguishes the alleged cause of action for such value. In other words, the plaintiff, pending such action, cannot waive the alleged tortious conversion by taking back the property, and at the same time continue the action and recover the full or partial value of the thing converted, not even to recover costs.' It will be observed that no cases are cited to sustain this proposition. It is true that in actions for conversion of property the measure of damages is generally the value of the property at the time and place of the conversion, with interest; but, when the circumstances show special damage over and above the value of the property, the almost universal current of authority is that such damage may be recovered in such action. This rule was recognized in Churchill v. Welsh, 47 Wis. 39, 1 N. W. Rep. 398, is incidentally referred to in Ingram v. Rankin, 47 Wis. 406, 2 N. W. Rep. 755, and is expressly stated in Parroski v. Goldberg, 80 Wis. 339, 50 N. W. Rep. 191. In Churchill v. Welsh, 47 Wis. 39, 1 N. W. Rep. 398, and again in Warder v. Baldwin, 51 Wis. 450, 8 N. W. Rep. 257, this court discussed the circumstances under which there may be a return of the property converted, in mitigation of damages, pending the suit. The conclusion arrived at was that in case of such return, and in the absence of evidence showing special damage, the recovery should be limited to nominal damages. In Farr v. Bank, 87 Wis. 223, 58 N. W. Rep. 377, the rule is again referred to and affirmed. It is there distinctly said that unless the plaintiff has suffered special damages, apart from the value of the property, the recovery must be limited to nominal damages, although in that case the return was made before the action was brought. It will be observed that the court speaks of the return of the property as being in mitigation of damages, and not in extinguishment of the cause of action. This seems to be the rule everywhere, as will be seen by reference to the following authorities: Cooley, Torts (2d Ed.), 535, note 1; 2 Add. Torts, p. 513, § 534; 2 Jag. Torts, 720; Walker v. Fuller, 29 Ark. 448 (where it is explicitly stated that, although the plaintiff could not recover the full value of the goods after retaking them, yet the receipt back of the goods alone would not bar the action. The fact should have gone in mitigation of damages); Bank v. Leavett, 17 Pick. 1, where it is said, 'It is also well settled that, if the property for which the action is brought be returned to and received by the plaintiff, it shall go in mitigation of damages.' 28 Am. Dec. 268, and note. The case of Bigelow Co. v. Heintze, 53 N. J. Law, 69, 21 Atl. Rep. 109, contains an extended discussion of this question. The court says: 'In trover the cause of action is complete upon proof of the conversion. The return of the property is no bar to the action, but is admissible in mitigation of damages.' Many other cases might be cited, but to do so would incumber the record. The rule is universal, and rests upon the ground that the return of the property does not extinguish the cause of action, but simply goes in mitigation of the damages. It being established in this State that special damages may be recovered in actions of this kind, the infirmity of the rule stated in Collins v. Lowry becomes apparent. The theory of the case is not that 'the defendant is only answerable for the value of the

property.' He is answerable, not only for the value of the property, but for any special damage the plaintiff has sustained. Hence a return or retaking of the property goes only to mitigate the damages, and not in bar of the action. In the case at bar, however, no special damages are shown. In Hiort v. Railway Co., 4 Exch. Div. 188, 195, Bromwell, L. J., said: 'A conversion cannot be purged, and if a defendant is guilty of conversion he must pay some damages. A return of the goods undoubtedly might be shown, to reduce the damages, in the case of conversion, not only when the owner voluntarily received back the goods, but when he took them back against his will. In an action of trover and conversion, the practice was for a defendant to apply to the court for a stay of proceedings on a delivery up of the goods, and on payment of nominal damages and costs; but if the plaintiff refused to accept delivery, and insisted on proceeding with his action for substantial damages, he did so at his peril, and if he failed to get substantial damages he was made to pay the costs of the action. It is clear, therefore, that on a return of the goods the plaintiff would recover, not their value, but the damages he had sustained by the wrongful act, which was called the conversion.' The rule above suggested, when a return of the property had been had, of applying to the court to stay or dismiss the action upon tender or payment of nominal damages and costs, was referred to and approved in Bigelow Co. v. Heintze, *supra*, and is one that furnishes ample protection to the defendant. It is certainly against the policy of the law to permit parties to carry on litigation when only the question of costs is involved. The case of Machine Co. v. Smith, 36 Wis. 295, however, does not quite strike the situation here presented. There the payment of the note in suit extinguished the entire cause of action, and the court held there could be no judgment for costs without a judgment for damages. Here the plaintiff was entitled, at least, to a judgment for nominal damages, which was a sufficient foundation to carry costs. The defendant might easily have protected himself by setting up the facts in his answer, and tendering payment of nominal damages and costs, as hereinbeforce suggested."

LIABILITY OF MUNICIPAL CORPORATIONS ON DEFECTIVE, VOIDABLE AND VOID CONTRACTS.

Section 1. Statement of General Doctrine as to Power to Make Contracts.—It may be stated, as a general proposition, that the municipal corporation, as ordinarily constituted, possesses full power and authority to make all contracts which are necessary and usual, fit and proper, to enable it to secure, or carry into effect, the purposes for which it was created. The extent of this authority is not limited by the express powers conferred by charter, or legislative act applicable, but there is an implied or incidental authority, to contract obligations, and to sue and be sued in the corporate name, because it is a municipal corporation.[1] Like an ordinary private corporation, as a trading corporation, unless expressly prohibited by law, it may enter into any contract necessary to enable it to carry out the powers and perform the duties conferred upon it.[2] However, in the language of the Supreme Court of the United States, "no powers can be implied except such as are essential to the objects and purposes of the corporation as created and established."[3] Notwithstanding contracts may be made by its officers and properly authorized agents in matters that necessarily appertain to its municipal functions, public officers and agents are confined more strictly to their designated powers than private general agents. As a general rule, a contract made by a public agent, within the general scope of his power, does not necessarily bind his principal in the absence of specific authority. The public corporation is not bound "unless it manifestly appears that the agent is acting within the scope of his authority, or is held out as having authority to do the act, or is employed in his capacity as a public agent to make the declaration or representation for the government."[4] The officer has no general power to bind the city; his authority is special only.[5] A compliance with all legal conditions prescribed which are regarded as mandatory is essential to render

[1] State v. Walbridge, 119 Mo. 383; Aurora Water Co. v. Aurora, 129 Mo. *l. c.* 576, 577; Linn v. Chambersburg, Boro, 160 Pa. St. 511-521; Coal Float v. Jeffersonville, 112 Ind. 15, 18; Crawfordsville v. Braden, 130 Ind. 149, 155; Bluffton v. Studebaker, 106 Ind. 129; Green v. Cape May, 41 N. J. L. 45, 47; Atlantic City Waterworks Co. v. Atlantic City, 39 N.Y. Eq. 369.

[2] 15 Am. & Eng. Ency. Law, p. 1080; Presbyterian Church v. New York, 5 Cow. (N. J.) 538, 540.

[3] Per Waite, C. J., in Ottawa v. Carey, 108 U. S. 110, 121. See Hitchcock v. St. Louis, 49 Mo. 484; Spaulding v. Peabody, 153 Mass. 129, 134, 33 Am. & Eng. Corp. Cas. 538, 10 L. R. A. 397; Cooley's Const. Lim. (6th Ed.) 231; 1 Beach, Pub. Corp. §§ 637 to 652; 1 Dillon, Munic. Corp. § 223; Willcock, Munic. Corp. § 230.

[4] 1 Dillon, Munic. Corp. §§ 445, 447, 457, 531, 533.

[5] Ross v. Phila., 115 Pa. St. 222; Baltimore v. Keyser, 72 Md. 106.

valid and enforcible contracts made in the name of the municipal corporation.[6]

Sec. 2. Power to Make Contracts Must Exist—Ultra Vires.—The city cannot in any manner bind itself by any contract which is beyond the scope of its powers, or entirely foreign to the purposes for which it was created, or which is against public policy. All persons are held to know the limitations of the city in this respect. Hence, every contractor with a municipal corporation for the doing of public work is bound to take notice, not only of the terms of the ordinance under which the contract is made, but also of the provisions of the charter under which the ordinance has been passed. In other words, he is obliged to see, not only that his contract complies substantially with the ordinance, but he is required to go further and ascertain whether the ordinance is authorized by the charter.[7] So persons dealing with *quasi* public corporations, as counties, are bound to take notice of the power and authority of the officers and agents of such corporations.[8] Although a contract by the city for services of prisoners in its workhouse to a private person is *ultra vires*, where neither authorized or prohibited by its charter, is not illegal, hence the city is entitled to recover for work actually done by such prisoners, for the other party having derived benefits under the contract is estopped from denying its validity.[9]

Sec. 3. Same—Ratification.—"The city may ratify the unauthorized acts and contracts of its agents or officers, which are within the corporate powers, but not otherwise."[10] Thus the city cannot ratify the unwarranted allowance of the payment of excessive salaries or fees, or, for work done, whether provided by contract or ordinance, violative of charter provisions. The view taken by the Supreme Court of the United States, and the only view which appears to us consistent with legal principles, is as follows: "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."[11] Thus, where

[6] Werth v. Springfield, 78 Mo. 107; Woolfolk v. Randolph County, 83 Mo. 501; Forry v. Ridge, 56 Mo. App. 615; Crutchfield v. Warrensburg, 30 Mo. App. 456; Rumsey Mfg. Co. v. Schell City, 21 Mo. App. 175; Thrush v. Cameron, 21 Mo. App. 393; Stewart v. Clinton, 79 Mo. 603. As to form of contracts, see Burschfield v. New Orleans, 42 La. Ann. 235; Fox v. Sloo, 10 La. Ann. 11.

[7] Cole v. Skrainka, 37 Mo. App. 427, 105 Mo. 303; Keating v. Kansas City, 84 Mo. 415; Cheeney v. Brookfield, 60 Mo. 53; Verdin v. St. Louis, 131 Mo. *l. c.* 98; Fruin-Bambrick Construction Co. v. Geist, 37 Mo. App. 509; Thornton v. Clinton, 50 S. W. Rep. 295; Perkinson v. St. Louis, 4 Mo. App. 322; Wheeler v. Poplar Bluff, 149 Mo. 36, 46, 47. "The party dealing with a municipal corporation is bound to see to it that all mandatory provisions of the law are complied with, and if he neglects such precaution he becomes a mere volunteer, and must suffer the consequences." Durango v. Pennington, 8 Colo. 257, 260; Sullivan v. Leadville, 11 Colo. 483. A city cannot authorize one who had been mayor to sign bonds, as of a date during his mayorality term. Coler v. Cleburne, 131 U. S. 162.

[8] State v. Bank, 45 Mo. *l. c.* 538; Andrew County v. Craig, 32 Mo. 528; Sturgeon v. Hampton, 88 Mo. 203; Butler v. Sullivan County, 108 Mo. 630; Drainage Dis. No. 1 v. Daudt, 74 Mo. App. 579.

[9] "The principal in that contract has derived benefits under it; he cannot retain those benefits and repudiate the source from which they spring by denying the validity of the contract in which they originated. In short, he is estopped to grasp the benefits of that contract with one eager hand, while thrusting aside its burdens with the other. The principle here asserted is one promotive of fair dealing, which is the basis of estoppels, and is good law as is exemplified by many adjudications. • • • In ruling thus • • • we do not intimate that we would enforce an *ultra vires* contract, if executory; we merely hold that good morals and even-handed justice demand that the defendant should disgourge." Per Sherwood, J., in St. Louis v. Davidson, 102 Mo. 149, 153, 154, 156, 22 Am. St. Rep. 764. See comments in 1 Beach, Pub. Corp. § 218.

[10] 1 Dillon, Mun. Corp. § 463; Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264; Ruggles v. Collier, 43 Mo. 353; Crutchfield v. Warrensburg, 30 Mo. App. 456; Philadelphia v. Hayes, 93 Pa. St. 73; Philadelphia v. Jewell, 135 Pa. St. 329; Pepper v. Philadelphia, 114 Pa. St. 96. Where the city has no power to make the contract in the first instance, it is powerless afterwards to ratify it. Maupin v. Franklin County, 67 Mo. 327, 330; Johnson v. School District, 67 Mo. 319; McKissick v. Mt. Pleasant Township, 48 Mo. App. 416. Dullant v. Vaughn, 77 Wis. 38; Benton v. Hamilton, 110 Ind. 294; Lyddy v. Long Island City, 104 N. Y. 218; 1 Beach, Pub. Corp. §§ 695, 696, and cases.

[11] Per Mr. Justice Gray, in Cen. Trans. Co. v. Pullman Pal. Car Co., 139 U. S. 24, 59, 60. See 2 Dillon,

a city exceeds its powers in executing bonds, its officers cannot by agreement, or the payment of interest on such bonds, estop the city from raising the question of the validity of the issue,[12] for the city may defend on the ground that it had no legal authority to execute and issue such bonds.[13] The fact that the corporation may have received benefit of money raised on the bonds is immaterial.[14] Where such ratification is permitted it may result from acquiesence after knowledge of all the material facts, or from acts inconsistent with any other supposition.[15]

Sec. 4. General Rule of Liability Stated and Illustrated.—The municipal corporation is bound by all contracts which it may legally enter into in like manner as the private corporation or an individual. The obligation to do justice rests upon all persons, whether artificial or natural. The rule as to immunity of government from liability on contracts has no application to municipal corporations. They are held liable even when acting as representatives of the government.[16] The following cases well illustrate the general rule of liability: The Supreme Court of the United States has held that the grant of right to supply water or gas to a city and its inhabitants through pipes and mains laid in the streets upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the State in consideration of the performance of a public service, and after performance by the grantee is a contract protected by the constitution of the United States and the legislature cannot impair it.[17] An exclusive franchise granted to supply water to the inhabitants of a municipality by means of proper mains made through the public streets, is violated by a grant to an individual in the municipality of the right to supply his premises with water by means of a pipe or pipes so laid.[18] It may be stated, as a general proposition, that when a city makes a contract for a municipal improvement, *e. g.*, conferring the right to introduce, distribute and sell water within the city, it cannot in derogation of its contract, by ordinance or otherwise, impose additional burdens upon the grantee, or vary the conditions contained in the contract.[19] So, when, by ordinance, a municipal corporation has authorized a telephone company to erect poles and string its wires, upon certain conditions which are complied with, the municipality cannot by a subsequent ordinance require the company to pay so much for each pole erected by it within a certain district in return for being allowed to keep and use such poles.[20] So, where a city enters into a valid contract, by an ordinance, which allot to a private corporation particular subway spaces in its streets for laying its telephone and telegraph wires, it cannot invalidate or impair that contract by a subsequent ordinance repudiating it and allotting the same spaces to another company.[21] One may be employed to per-

Munic. Corp. § 936, 5 Am. Law Rev. 272.

[12] Oxford v. Union Bank (C. C. A.), 96 Fed. Rep. 293, 298, and cases. See 1 Beach, Pub. Corp. § 221 *et seq.*

[13] German Ins. Co. v. Manning, 95 Fed. Rep. 597; Geer v. School District (U. S. C. C. App.), 97 Fed. Rep. 732.

[14] O'Brien v. Wheelock, 95 Fed. Rep. 883; Agawam Nat. Bank v. Hadley, 128 Mass. 503; Nat. Bank v. Lowell, 109 Mass. 214. But see Louisiana v. Wood, 102 U. S. 294; Paul v. Kenosha, 22 Wis. 266.

[15] 1 Dillon, Munic. Corp. § 463. The case of St. Louis v. Armstrong, 56 Mo. 298, affords a good illustration where the city was held to ratify the acts of its officers by availing itself of the benefit of their acts. See Brass Foundry & M. Works v. Board, etc., 115 Ind. 234; Bluffton v. Studebaker, 106 Ind. 129; Cullen v. Carthage, 103 Ind. 196, 53 Am. Rep. 504. In an action against a city on a contract, as modified by resolution of its legislative body, in New York, it has been held that the city may defend on the ground that the resolution is void because corruptly procured. The act of the legislative body in passing a resolution waiving a requirement of a contract for a local improvement is not legislative in its character, but administrative, and not being impressed with the character of sovereignty, the motives that induced it are the subject of judicial investigation. Weston v. Syracuse, 158 N. Y. 274, 53 N. E. Rep. 274. So, in the same State it has been held that the city may defend against an action on a contract which has been let to the lowest bidder, and the mandatory provisions of its charter apparently complied with, on the ground that by fraudulent collusion between the contractor and the city officers the contract was intentionally let to one who was actually, though not apparently, the highest bidder. Nelson v. New York, 5 N. Y. Sup. 689. See People v. Stephens, 71 N. Y. 527, 558. Where authority to do the act can only be conferred by ordinance, the ratification can only be made by ordinance. Pimetal v. San Francisco, 21 Cal. 351.

[16] See Potter on Corporations, § 376.

[17] Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

[18] New Orleans Waterworks Co. v. Rivers, 115 U. S. 674.

[19] Los Angeles v. Los Angeles Water Co., 61 Cal. 65.

[20] New Orleans v. Gr. So. Tel. Co., 40 La. Ann. 41, 26 Cent. L. J., 233 and notes.

[21] State v. St. Louis, 145 Mo. 551. See Safety Insulated Wire & C. Co. v. Baltimore, 25 U. S. App. 166,

form a service under contract with the city without becoming a municipal officer, and when such is the case the city cannot vary the terms of the contract nor repudiate it;[22] nor can the city repudiate by resolution a deed which it was authorized to execute.[23] The rule of liability has been applied to govern the contracts and control the acts of States clothed with the powers and prerogatives of sovereignty.[24] But the State may enter into a contract with the city in matters outside of its charter, which cannot be impaired or annuled, notwithstanding the unlimited and autocratic power of the legislature over cities.[25] So, when a municipal corporation, by authority of the State, contracts with a third person, whereby rights become vested in such person, they cannot be devested by the State. Such a contract is *pro haec vice* the contract of the State and cannot be impaired by it. Hence, where the common council, in the exercise of power conferred by the legislature, made an absolute grant to a horse railway company of the right to build its road on certain streets, and the company accepted the grant and built a part of the road at great expense, it was held that the legislature could not, by a subsequent amendment of the city charter, make the right of the company to build the rest of the road dependent upon the consent of a majority of the property owners on the street.[26] It thus appears that municipal liability exists, first, where the contract is within the scope of the power of the corporation; second, where made by the proper officers or agents; and third, where, in making the contract, mandatory legal provisions have been observed.

Sec. 5. Liability as Upon Implied Contracts. — That municipal corporations are liable to actions of implied *assumpsit* is a doctrine firmly established.[27] Thus, where the city appropriates and uses the property of another, an obligation to pay for its use is implied which may be enforced by action.[28] And municipal corporations having received money or property under contracts so far beyond their powers as not to be capable of being enforced or sued on, according to their terms, have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they have received. Thus, where a city was sued for damages for putting an end to a contract with the plaintiffs for the improvement of its sidewalks, the only invalid part of which was its promise to pay in bonds, which was beyond its power to issue, it was decided by the Supreme Court of the United States that the invalidity of that promise was no reason why the city should not pay for the benefits which it had received from the plaintiff's performance of the contract. "It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all."[29] The proposition that a city cannot incur liabilities otherwise than by ordinance, "in its full extent is not tenable. Under some circumstances the municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations. This is as well established by the authorities as any principle of law can be. * * * A corporate act is not essential in all cases to fasten a liability, and if it were necessary, the law would sometimes presume, in order to uphold fair dealings, and prevent gross injustice, the existence of such acts, and estop the corporation from denying it. Where the contract is executory, the corporation cannot be held

66 Fed. Rep. 140; Ill. Tr. & Sav. Bank v. Ark. City, 40 U. S. App. 257, 76 Fed. Rep. 271.

[22] Hall v. Wisconsin, 103 U. S. 5.

[23] Dausch v. Crane, 109 Mo. 323, 330.

[24] Woodward v. Dartmouth College, 4 Wheat. 518; Western Sav. Fund Soc. v. Phila., 31 Pa. St. 175.

[25] Black's Const. Pro. § 729.

[26] Hovelmann v. K. C. H. Ry. Co., 79 Mo. 632.

[27] 1 Dillon, Munic. Corp. §§ 459, 460; 2 Dillon, Munic. Corp. § 933. Numerous decisions illustrating this doctrine are classified and stated in a recent article by Judge Seymour D. Thompson, 33 Am. Law Rev. pp. 707 to 730; Wheeler v. Chicago, 24 Ill. 105; Sangamon County v. Springfield, 63 Ill. 66.

[28] Center School Twp. v. State, 150 Ind. 168; Deane v. Hodge, 35 Minn. 146, 59 Am. Rep. 321.

[29] Per Mr. Justice Strong, in Hitchcock v. Galveston, 96 U. S. 341, 350; State Board v. Citizens' Ry. Co., 47 Ind. 407; Alleghany City v. McClurkin, 14 Pa. St. 81; East St. Louis v. East St. Louis Gas Co., 98 Ill. 415.

bound unless the contract is made in pursuance of the provisions of its charter, but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied *assumpsit* arises against it."[30]

Sec. 6. Limitations of Doctrine — Ultra Vires Acts — Remedies.—Unauthorized contracts, that is, contracts which the corporation had no power at all to make, are void, and in actions thereon the city may successfully interpose the plea of *ultra vires*, invoking as a defense its own lack of power to make the contract.[31] Thus, where a contract by a city for a public improvement is invalid because no ordinance was previously passed as required by statute, the city is not estopped to assert its invalidity because the work has been done thereunder, and the city has received the benefit thereof.[32] The doctrine of liability, as upon implied contracts, has no application to improvement of streets. "That doctrine applies to cases where money or other property of the public is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same." "A municipal corporation can only act in the cases and in the mode prescribed by its charter; and for street improvements of a local nature, express contracts authorized by ordinance are necessary to create a liability." So, in reference to services rendered, the doctrine of implied liability does not apply.[33] It has been said that in favor of *bona fide* holders of negotiable securities, the corporation may be estopped to avail itself of any irregularities in the exercise of power conferred; but it may always show that under no circumstances had the corporation power to make a contract of the character in question.[34] A contract by which a corporation binds itself not to exercise certain franchises committed to it by the State for public purposes is *ultra vires* and void, and cannot be set up as a defense in an action to compel specific performance of an obligation imposed by law upon such corporation.[35] As a city cannot limit its legislative discretion or powers by contract, it is not estopped when a contract by which it unlawfully attempts to do so is sought to be enforced against it from invoking the defense or plea of *ultra vires*.[36] There can be no recovery on warrants issued without authority of law in order to create a fund to aid a city in securing the location there of a State capital.[37] A contract for public work which is invalid because of defective legislation, does not render the city liable to the contractor for the value of the work, although no recovery can be had against the abutting property owner.[38] So where a contract entered into for paving and grading to

[30] Per Field, J., in San Francisco Gas Co. v. San Francisco, 9 Cal. 453, 469, 472. See Argenti v. San Francisco, 16 Cal. 255, 273, 274. "The obligation to do justice rests upon all persons, natural and artificial; and if a county obtains money or property of another, without authority, the law, independent of statute, will compel restitution or compensation." Per Mr. Justice Field, in Marsh v. Fulton County, 10 Wall. (U. S.) 676, 684, approved in Louisiana v. Wood, 102 U. S. 294, 299, and Chapman v. Douglas County, 107 U. S. 348, 355; Read v. Platsmouth, 107 U. S. 568; Salt Lake v. Hollister, 118 U. S. 256, 263; Pennsylvania R. R. v. St. Louis, etc., 118 U. S. 316, 318; Brush Electric Light, etc. Co. v. Montgomery, 114 Ala. 433, 447. Compare opinion of Mr. Justice Jackson in Hedges v. Dixon County, 150 U. S. 182, 185, 186.

[31] 1 Dillon, Munic. Corp. § 457; 2 Dillon, § 955; Cooley's Const. Lim. (6th Ed.) 261; 1 Beach, Pub. Corp. § 592 *et seq.*; Thomas v. Port Hudson, 27 Mich. 320; Sutro v. Petitt, 74 Cal. 332, 5 Am. St. Rep. 442.

[32] See Covington, etc. R. Co. v. Athens, 85 Ga. 367; Wheeler v. Poplar Bluff, 149 Mo. 36, 49 S. W. Rep. 1088; Valle v. Independence, 116 Mo. 333.

[33] Per Field, C. J., in Argenti v. San Francisco, 16 Cal. 255, 282, 283. See Newberry v. Fox, 37 Minn. 141, 5 Am. St. Rep. 830.

[34] St. Louis v. Davidson, 102 Mo. 149, 153; 1 Dillon, Munic. Corp. §§ 163, 457, 511, 553, 936, 5 Am. Law. Rev. 272; 1 Beach, Pub. Corp. §§ 614, 615, 616; Drainage Dist. No. 1 v. Daudt, 74 Mo. App. 579; Butler v. Sullivan County, 108 Mo. 630. The city cannot evade liability, as from payment of internal revenue tax, on account of liquor distilled by it on the ground of its want of authority to engage in such business. Salt Lake City v. Hollister, 118 U. S. 256. The following cases illustrate various phases of the doctrine. Buchanan v. School District, 25 Mo. App. 85; St. Louis v. Bell Tel. Co., 96 Mo. 623; Millsaps v. Monroe, 37 La. Ann. 641; New Decauter v. Berry, 90 Ala. 432; Huesing v. Rock Island, 128 Ill. 465; Strahan v. Malvern, 77 Iowa, 454; State v. Baxter, 50 Ark. 447; Citizens' Gas & M. Co. v. Elwood, 114 Ind. 332; Waxahachie v. Brown, 67 Tex. 519. The city cannot be bound for work done outside of the contract. Sexton v. Cook County, 114 Ill. 174. The city cannot be bound by contract to pay extra compensation to its officers.

[35] St. Louis v. St. Louis Gas Light Co., 5 Mo. App. 484.

[36] Presbyterian Church v. New York, 5 Cow. (N. Y.) 538, 542.

[37] Watson v. Huron, U. S. Ct. App.

[38] Saxton v. St. Joseph, 60 Mo. 153.

be paid for by special tax bills issued against the owner of the property abutting on the street, is void under the charter, for want of authority in the city to enter into it, and wholly illegal, the property owners cannot be held liable for any part of the work done against their will and protests.[39] In one case it is held that a city is not liable on a warrant issued to a bank note company in payment of a debt to the company for engraving and printing on bank note paper notes payable to bearer, to be put into circulation by the city as money without authority of law, the court saying that there could be no implied *assumpsit* in such a case.[40] The defense of *ultra vires* may be interposed by a public corporation, even where the corporation has received the benefit of the services rendered through the unauthorized acts of its statutory agents. For, as stated, respecting services rendered the doctrine of implied liability does not apply.[41] As a result of the previous case in the United States Supreme Court, it has been said that "a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover, as on a *quantum meruit* the value of what the defendant has received the actual benefit of."[42] "A contract *ultra vires*, being unlawful and void, not because it is in itself immoral, but because the corporation by the law of its creation is incapable of making it,—the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money it has no right to retain. To maintain such action is not to affirm, but to disaffirm the unlawful contract."[43] The United States Supreme Court has said that the ordinary rules which govern in proceedings between private persons or private corporations are applicable to actions by or against municipal corporations. This grows out of the right of the city to sue and its liability to be sued.[44] "There can be hardly any doubt that, where the rule of procedure in a particular jurisdiction allows the plaintiff, in the case where his money or property has been tortiously taken by an individual, to waive the tort and sue in *assump-*

[39] Verdin v. St. Louis, 131 Mo. *l. c.* 98.

[40] Cheeney v. Brookfield, 60 Mo. 52. See Walcott v. Lawrence County, 26 Mo. 272.

[41] Drainage District No. 1 v. Daudt, 74 Mo. App. 579; Butler v. Sullivan County, 108 Mo. 630; Carroll v. St. Louis, 12 Mo. 444. See St. Louis v. Gorman, 29 Mo. 593; Sturgeon v. Hampton, 38 Mo. 203, 214; Helena v. Turner, 36 Ark. 577; Monticello v. Cohn, 48 Ark. 254; National Bank v. Mathews, 98 U. S. 621; Pook v. Lafayette B. A., 71 Ind. 357; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Parish v. Wheeler, 22 N. Y. 494; Argenti v. San Francisco, 16 Cal. 255, 282; Weber v. Agricultural Soc., 44 Iowa, 233. The defense of *ultra vires* cannot be raised by one was a party to the contract and has received the benefits of such contract. Feld v. Roanoke Inv. Co., 123 Mo. 603. The right of an officer to recover on an implied contract with a municipality for materials supplied to it, where the statutes prohibit him from being directly or indirectly interested in any contract with the city, and making a violation thereof a misdemeanor is denied in Berka v. Woodward (Cal.), 45 L. R. A. 432, on the ground that the implied contract is as much prohibited as an express contract.

[42] Pittsburg, etc. R. v. Keokuk & H. B. Co., 131 U. S. 371, 389.

[43] Per Mr. Justice Gray, in Central T. Co. v. Pullman Pal. Car Co., 139 U. S. 24, 60, approving rule stated by Mr. Justice Miller. A person with whom a corporation has entered into contract may plead, in defense to an action thereon that the contract is *ultra vires*, as long as the contract has not been fully performed by the corporation. Bowman Dairy Co. v. Mooney, 41 Mo. App. 656. Courts will refuse to interfere in behalf of a corporation whose rights rest only in executory contract, which it seeks outside of the provisions of its charter to have enforced. Conn. Mut. L. I. Co. v. Smith, 117 Mo. *l. c.* 290; Case v. Kelly, 133 U. S. 28. Where a contract which is beyond the powers of the corporation to make has been executed the defense of *ultra vires* cannot be interposed by the other party, nor can it be raised by third persons in a collateral attack. Thornton v. Nat. Exchange Bank, 71 Mo. 221; Con. Mut. L. I. Co. v. Smith, 117 Mo. *l. c.* 289; Atl. & Pac. Ry. Co. v. St. Louis, 66 Mo. 228; Showalter v. Pirner, 55 Mo. 219; Ragan v. McElroy, 98 Mo. 349. So the defense of *ultra vires* is not open to a corporation when the contract has been fully executed on the part of the other contracting party, and is not expressly prohibited by law. Winscott v. Inv. Co., 63 Mo. App. 367; Grohman v. Brown, 68 Mo. App. 630; Weyrich v. Grand Lodge, 47 Mo. App. 391; Lysaght v. St. L. Stone M. Assn., 55 Mo. App. 538.

[44] Met. R. Co. v. Dis. of Col., 132 U. S. 1, 9; Hunt v. San Francisco, 11 Cal. 250, 258.

sit, this remedy is equally available where the defendant is a municipal corporation, especially in view of the fact that this rule of procedure is beneficial, rather than prejudicial, to the defendant. In fact, in the few cases in which the question has been mooted, it seems to have been uniformly held that the same rules of procedure apply in actions against municipal corporations as in actions against individuals."[45]

Sec. 7. Contracts for Public Work—Restricting Competition.—Where the municipal corporation possesses power to make contracts for public work, as for the improvement of its wharves, public grounds, streets and sewers, as stated, all provisions of the law which are considered mandatory must be substantially complied with in order to render the contract valid and enforceible. Where law requires work to be let to the "lowest bidder" or the "lowest responsible bidder," after public advertisement, restrictions made by ordinance or otherwise may have the effect of rendering such contracts void. Thus, where a board of education, in awarding a public contract, restricts the bidding so as to exclude non-union labor, which results in increasing the cost of work to the public, where the law requires the work to be let to the lowest bidder, the contract made thereunder is void.[46] However, the mere restriction of competition will not justify judicial interference, especially where the law does not require the work to be let to the lowest bidder, but in such case it must affirmatively appear that because of the restriction the cost of the work has been increased.[47] The reason is obvious. Courts do not sit to determine abstract legal propositions. Mere irregularities on the part of the awarding officer, although constituting positive violation of law, must result in harm to the public, the bidder, or the complainant. Thus, in a recent Illinois case, an injunction on behalf of taxpayers, to nullify a printing contract let by a city was sustained solely on the ground that it affirmatively appeared that the restriction "increased the cost of the printing to the injury of the taxpayers." In this case, the city charter expressly required contracts of this charcter to be let to the "lowest bidder."[48] Notwithstanding the particular charter expressly requires contracts for public work to be let to the "lowest bidder," after public advertisement, species of work street covered by letters patent, held by a single person or firm, may be required. So, where one person or corporation has an exclusive monopoly of furnishing certain street material, as asphaltum, it has been held that such charter provision does not apply. These rulings have been made where the expense of the work is not paid out of the general revenue, contributed by the taxpayers, but by the abutters, and the question of increased cost of the improvement to them because of the absence of competition, does not appear to affect the validity of the contract, or the special tax bills.[49] It has been held to be no objection to such contracts where the charter does not require them to be let to the "lowest and best bidder."[50]

St. Louis, Mo. EUGENE MCQUILLIN.

[45] Article by Judge Seymour D. Thompson, 33 Am. Law Rev. 729.

[46] Adams v. Brenan, 177 Ill. 194; 52 N. E. Rep. 314. See Elliott v. Pittsburgh, 6 Pa. Dist. Rep. 455.

[47] See St. Louis Quarry Co. v. Von Versen, 2 Mo. App. Rep. 891.

[48] Holden v. Alton, 179 Ill. 318, 324.

[49] Verdin v. St. Louis, 131 Mo. 26; Barber Asphalt Co. v. Hunt, 100 Mo. 22; McCormick v. Patchin, 53 Mo. 33; 1 Dillon, Mun. Corp., § 467; 15 Am. and Eng. Ency. of Law, pp. 1093, 1094. *Contra:* Dean v. Charlton, 23 Wis. 590.

[50] Kansas City Transfer Co. v. Hurling, 22 Mo. App. 654.

MASTER AND SERVANT—INJURY TO THIRD PARTY—SERVANT'S ACTS—SCOPE OF EMPLOYMENT—MASTER'S LIABILITY.

CANTON COTTON WAREHOUSE CO. v. POOL.

Supreme Court of Mississippi, Oct. 29, 1900.

Plaintiff accepted the invitation of defendant's night watchman to visit defendant's ice factory at night to see the process of making ice. While there, the watchman and other employees, for the purpose of a practical joke, suddenly turned off all the electric lights in the building, allowed steam to escape with a loud noise, dragged a coal shovel up and down the iron stairs of the engine, and uttered loud cries, thereby alarming plaintiff so that, in a rush to escape, he fell and injured himself. *Held*, that defendant should have had a peremptory instruction, since the acts of defendant's employees, by which the injury was caused, were totally disconnected with their employment and defendant's business, and were done for their own purposes.

WHITFIELD, C. J.: The Canton Cotton Warehouse Company is a corporation domiciled at Canton, Miss., and is engaged in the business of

manufacturing ice. On the occasion complained of it was running at night, and was lighted throughout with electricity. Appellee, who lived in the country, in company with two friends, also from the country, while in the town of Canton, met an old acquaintance, who was night watchman for the warehouse company, and on the invitation of the night watchman entered the warehouse with him, for the purpose of seeing the operation of making ice. The door through which they entered was on a level with the ground, and led into the engine room, and up a flight of steps into the boiler room. When they entered they found four men, who were employees of the warehouse company, and who were operating it that night. While appellee and his friends, the unsuspecting victims of the joke to be perpetrated, were in the warehouse watching the operation of making ice, the lights were suddenly turned out, and the whole house turned into midnight darkness, a coal shovel scraped up and down the stairs of the engine, the noise of escaping steam, the crash of machinery, with cries and screams, saluted their ears. Appellee and his friends became frightened, and, instead of going out at the door through which they entered, they rushed out at the east door, into the dark, and appellee fell off of a platform some four feet high, his face striking a rail of the Illinois Central Railroad track, knocking out two teeth, and causing him to bite his tongue and otherwise injure himself. A trial by jury was had, and, after plaintiff's evidence was all in, defendant moved the court to give judgment for defendant. The motion was overruled, and the trial proceeded, and resulted in verdict and judgment in favor of plaintiff for $1,000, and defendant appeals.

The act done here was not the act of the master. It was not done in the master's business, but was an enterprise wholly disconnected therefrom, done exclusively on their own account by the employees, for the highly reprehensible purpose of playing a practical joke. It very clearly appears that though the implements used were those of the company, used in certain ways in the making of ice, they were in this act not used as they would be in the making of ice. The slamming of the coal scoop on the iron stairs, and the shutting off of steam, usually self-regulating by the automatic air pump, the turning out of the electric lights, and the yelling of the voices were not modes of making ice, but were a use solely for a mischievous purpose of those engaged in it, and in no sense an act done in the master's business. The case is wholly different from Richberger's case, 73 Miss. 161, 18 South. Rep. 922, 31 L. R. A. 390. There Richberger was in the express company's office, transacting express business. The agent was refunding him an overcharge, and taking a receipt therefor, and "immediately" upon the signing of the receipt, so that there could be no logical separation of what he did in the assault from the transaction of the express business, committed the assault. The appellee here was engaged in no business with the appellant—buying no ice. No employee of appellant was engaged in transacting any business of his master's with appellee. The acts done in the perpetration of this practical joke were wholly out of the line of their employment. That the appellee has no cause of action against appellant is made plain by the authorities collected in the exhaustive note to Ritchie v. Waller (Conn.), 27 L. R. A. 161, 28 Atl. Rep. 29, and by Railroad Co. v. Latham, 72 Miss. 32, 16 South. Rep. 757. And see, specially, Round v. Railroad Co., 64 N. Y. 136; Bowler v. O'Connell (Mass.), 38 N. E. Rep. 498, 27 L. R. A. 173; Smith v. Railroad Co., 78 Hun, 524, 29 N. Y. Supp. 540. In Bowler's case, the court say: "An act done by a servant while engaged in his master's work but not done as a means, or for the purpose, of performing that work, is not the master's act." This is said to be too broad a statement of the law, at page 164, 27 L. R. A., in the note referred to, because it does not provide for the "misuse of a dangerous machine, as in Railway Co. v. Scoville, 10 C. C. A. 479, 62 Fed. Rep. 730, 27 L. R. A. 179"—a case relied on by appellant, affirmed by a divided court. But manifestly this is not a case like cases where the question is as to the custody of dangerous implements, as steam engines, dynamite, torpedoes, etc. The ordinary appliances in use in an ice factory cannot be so classed, certainly not a coal scoop and electric lights. The true test is very clearly stated in Smith's case, 78 Hun, 524, 29 N. Y. Supp. 540—a torpedo case. Says the court: "If by doing what he did he went outside of his employment, in order to effect a purpose of his own, in exploding the torpedoes for his own amusement, and not for the purpose of signaling the train, then the company would not be liable." The inquiry is not whether the act in question, in any case, was done, so far as time is concerned, while the servant was engaged in the master's business, nor as to mode or manner of doing it—whether in doing the act he uses the appliances of the master—but whether, from the nature of the act itself as actually done, it was an act done in the master's business, or wholly disconnected therefrom by the servant, not as servant, but as an individual on his own account. In the light of these principles, it is clear there was nothing to go to the jury, and the peremptory charge asked by defendant should have been given.

NOTE.—*Recent Decisions on Questions of Liability of Master for Injuries to Third Persons Caused by Acts of Servant Within the Scope of His Employment.*—Where the seller of a range, who has agreed to deliver it, with the necessary piping, and set it up ready for use, sends it by an agent, who sets it up in a defective and dangerous manner, the jury are authorized to infer that in so doing he was acting within the scope of his agency. Wrought-Iron Range Co. v. Graham, 25 C. C. A. 570, 80 Fed. Rep. 474. A clerk, undertaking to obtain from a customer an ar-

ticle that he believed was stolen, is so acting within the scope of his employment as to render his employers liable for an assault thereby committed. McDonald v. Franchere (Iowa), 71 N. W. Rep. 427. Where the servant of a coal company, in connection with his work of unloading coal from a car, threw a heavy plank from the car into the street, striking and injuring plaintiff, who was passing, the company is liable for the injury. Holmes v. Tennessee Coal, Iron & Railroad Co., 49 La. Ann. 1465, 22 South. Rep. 403. A servant instructed to admit in a church only such persons as have tickets, cannot, by directing police officers to arrest one who seeks to enter without a ticket, make his master liable for a false arrest made pursuant thereto, as he would not be acting within the apparent scope of his employment. Barabasz v. Kabat (Md.), 37 Atl. Rep. 720. In an action for injuries, caused by plaintiff's being knocked down in the entrance to defendant's station by its servant and a drunken man, while the former was ejecting the latter, there was evidence that the servant was employed specially to take care of the men's waiting room and closet, and to keep them clear of loafers. Held sufficient to show that the servant was acting within the scope of his authority. Gray v. Boston & M. R. R. (Mass.), 46 N. E. Rep. 397. A master's liability to third persons for the negligence of his servant, is not limited to acts of the servant done under the master's instructions, or approved by the master during the service, but he is liable for all negligent acts of his servant while acting within the general scope of his employment. Keep v. Walsh, 44 N. Y. S. 944, 17 App. Div. 104. Where waiters in a restaurant took the hats and overcoats of customers when they entered, it will be presumed that they acted within the scope of their employment. Appleton v. Welch, 45 N. Y. S. 951. Defendant employed one C to train their race horses, and authorized him to employ necessary jockeys and stable boys. C employed plaintiff to ride the horses for the purpose of exercising them. On one occasion, when plaintiff had finished his work with defendants' horses, C compelled him, without the knowledge of defendants, to ride a horse belonging to a third person who lived in the neighborhood, and brought the horse over to defendants' stable, and while so riding it plaintiff was thrown and injured. Held, that C was not acting within the scope of his employment in compelling plaintiff to ride such horse, and, therefore, defendants were not liable. Ray v. Keene, 45 N. Y. S. 896. Where railroad employees in charge of a locomotive sound the whistle, without any occasion therefor, for the purpose of frightening a horse near it, and not in the discharge of duty, the railroad company is not liable for damages caused thereby; such acts not being within the scope of their employment. International & G. N. R. R. Co. v. Yarbrough (Tex. Civ. App.), 39 S. W. Rep. 1096. The minor son of defendant, who was directed by him to shoot crows in a field, but who went into the woods to hunt squirrels, and when some two miles from defendant's premises, by his negligence, injured plaintiff, was not at the time of the act engaged in defendant's business so as to render defendant liable for the injury. Winkler v. Fisher (Wis.), 70 N. W. Rep. 477. The owner of an ice wagon, from which a piece of ice fell because it was defectively loaded, is liable to a person injured thereby, though the driver had deviated from his proper route for a purpose of his own, if at the time of the accident he had accomplished that purpose, and was proceeding to the place where his employment required him to go. Geraty v. National Ice Co , 44 N. Y. S. 659. A master is not relieved from liability for the acts of his servants because unnecessary or in violation of his instructions, if they were done in the exercise of their judgment or for their convenience in performing their work. McCauley v. Hutkoff, 46 N. Y. S. 85. A pastor rightfully instructing a doorkeeper of a church to admit only such as have tickets, is liable for injuries resulting from the use of unnecessary force by the doorkeeper in preventing from entering one who had no ticket. Barabasz v. Kabat (Md.), 37 Atl. Rep. 720. A master is not responsible for acts of an employee in the matter of making an arrest, where, for the time, he was acting under the direction and control of a police officer. Geary v. Stevenson (Mass.), 47 N. E. Rep. 508. It is within the apparent scope of the foreman and agent of the owners of a sawmill to direct the moving of lumber cars on a side track in proximity to the mill, which are at the time being loaded with lumber from the mill, even though such lumber cars and side track may not be owned, operated or controlled by the owners of the mill. Camp v. Hall, 39 Fla. 535, 22 South. Rep. 792. It is within the apparent authority of a clerk to invite a customer into the basement where the material the customer desires to purchase is kept. Clack v. Southern Electrical Supply Co., 72 Mo. App. 506. Where one employed as a baggageman at a theater, after the baggage had been removed, swept the dirt from the room onto the sidewalk, in the absence of evidence to the contrary, it will be presumed that, in opening the coal hole to admit the dirt, he was acting within the line of his employment, thereby rendering the master liable for an accident occurring from its having been negligently left open. Todd v. Havlin, 72 Mo. App. 565. A railroad company is not liable for the wrongful act of a section foreman in loaning to boys a hand car of which he has charge, where such acti s outside the scope of his employment, and he has no authority from the company to so loan it. Robinson v. McNeill, 18 Wash. 163, 51 Pac. Rep. 355. A street car company is not liable for the acts of its conductor in prosecuting a passenger for violation of a city ordinance making it a misdemeanor for any person to ride on a street car without paying his fare, in the absence of express authority from the company to the conductor to make such prosecution. Little Rock Traction & Electric Co. v. Walker (Ark.), 45 S. W. Rep. 57. Where employees of a railroad company customarily used its engine in going from their work to dinner, with its knowledge, it was liable for damages to third persons resulting from negligence in such use. East St. Louis Connecting Ry. Co. v. Reames, 173 Ill. 582, 51 N. E. Rep. 68. A railroad company is not liable for injuries inflicted on a trespasser by its employee while assisting the trainmen of another company in preventing the trespasser from climbing on its train, where such employee was performing no duty which he owed to the former, or which it owed to the latter. Illinois Cent. R. Co. v. Andrews, 78 Ill. App. 80. Plaintiff was arrested by one having no connection with defendant railroad company and locked up in the baggage room. While so confined, one employed as a detective of defendant, and subject to the orders of its law department, entered the place where plaintiff was confined, searched his clothing, committed indignities on his person, and used abusive language to him. There was no showing as to the duties, authority, or directions given to the detective,

except what might be inferred from the term "detective." Held, that a nonsuit should have been granted, since there is not sufficient evidence that the acts were within the scope of the detective's authority, to warrant the submission of the question of defendant's liability. Penny v. New York Cent. & H. R. R. Co., 53 N. Y. S. 1043, 34 App. Div. 10. Where one operates a car on the tracks of a railroad company for his private benefit, and without the company's consent, the company is not estopped to deny that it was a part of the operation of the road because he was a servant in charge of the car, and required to use it in his ordinary duties. Branch v. International & G. N. R. Co. (Tex.), 47 S. W. Rep. 974. Where a hand car was intrusted by a railroad company to the foreman of a telegraph repair gang for use in their work, and, contrary to his instructions, he used it on a private errand, and while doing so negligently ran it against a vehicle at a public crossing, the company is not liable. Branch v. International & G. N. R. Co. (Tex.), 47 S. W. Rep. 974. Where, in an action against a railway company, it appears that plaintiff was injured at a crossing by a hand car used by a section foreman for his private benefit, it is error to direct a verdict for defendant if there is evidence of negligence in intrusting the car to the foreman. Branch v. International & G. N. R. Co. (Tex.), 48 S. W. Rep. 891. An employer, owner of a park, is liable for the torts of a servant who, in the execution of orders not to allow any person in the park, throws a rock and injures plaintiff; the servant having shortly before ordered plaintiff from the park, the rock being thrown just as plaintiff was leaving, and the injury being inseparable from the act of getting plaintiff from the park. Alton Ry. & Illuminating Co. v. Cox, 84 Ill. App. 202. Where a motorman, to frighten away boys who had placed obstructions on the company's tracks, threw a stone near where he saw the boys in hiding, striking one of them, he was not acting within the scope of his employment, so as to render the company liable for the resulting injury, although it had previously instructed him that boys were in the habit of placing obstructions on the track, and that he should use special diligence to prevent the mischief. Dolan v. Hubinger, 109 Iowa, 408, 80 N. W. Rep. 514. Where the employees of an electric company, pursuant to general instructions from its managing agent to erect wires along a street, and cut such branches from overhanging trees as might be necessary to prevent contact with the wires, went into plaintiff's land and cut off overhanging branches, which could have been avoided by insulation of the wires, the company is liable, since its servants were acting within the scope of their employment. Van Siclen v. Jamaica Electric Light Co., 61 N. Y. S. 210, 45 App. Div. 1. A master is liable for an assault and battery committed by his servant while carrying out the former's orders to secure possession of property to which he was not entitled, though he merely directed the servant to take the property. Griffith v. Friendly, 62 N. Y. S. 391, 30 Misc. Rep. 393. Where plaintiff had rented a bakery from defendant, and defendant's agent, in making repairs, had willfully and maliciously destroyed the usefulness of the ovens, and had wrongfully brought an action to dispossess plaintiff, and had otherwise injured his business, defendant could not escape liability on the grounds that the agent had exceeded his authority, since such fact would not relieve him unless it appeared that the acts of the servant were to effect some purpose of his own. Levy v. Ely, 62 N. Y. S. 855, 48 App. Div. 554. P was contractor for construction of a building. B was subcontractor for doing the cornice work, his contract providing that P should erect a scaffold for him. S was subcontractor to do the slag roofing and tin work, his work having nothing to do with the work provided for by the contract of B. Held, that P was not liable for injury to employees of S from the falling of the scaffold, their entrance on the scaffold not being within the scope of their employment, and not being authorized or known to S, and they not being called to the scaffold in the performance of the work S contracted to do, and the erection of the scaffold on which to do the work called for by S's contract not being required for its performance. Rowan v. Prettyman, 194 Pa. St. 448, 45 Atl. Rep. 380.

BOOK REVIEWS.

OWEN'S LAW QUIZZER. Second Edition.

Questions and answers on twenty-five of the most important topics of the law, designed especially for the use of law students in review work in preparation for examination for degrees in law colleges or for admission to the bar. The subjects embraced in these questions and answers are agency, bailments, constitutional law, contracts, criminal law, criminal procedure, damages, domestic relations, equity, evidence, executors and administrators, insurance, jurisdiction of United States courts, legal ethics, municipal corporations, negotiable instruments, partnership, personal property, pleading, private corporations, real property, sales and statute of frauds, suretyship and guaranty, torts, wills. In this work the author has combined all of the fundamental and underlying principles and rules contained in 25 of the principal and most essential branches of the law. The answers have been framed with reference to the common law, it not having been found practical to notice statutory changes, excepting where they are nearly uniform throughout the United States. Students will therefore find it necessary to consult local statutes carefully. We are glad to notice that this book endeavors to instill correct principles into the legal student. Under the head of legal ethics is asked: "Can an attorney properly refuse to appear for the plaintiff in a civil cause which he considers unjust? A. He not only has the right but is in duty bound to refuse to be concerned for a plaintiff in the legal pursuit of a demand which offends his sense of what is just and right. The courts are open to the party in person to prosecute his own claim and plead his own cause, which he should be compelled to do in such a case." The author is Wilbur A. Owen, LL. M. of the Toledo bar. The book contains 615 pages, well printed and bound in law sheep. Published by West Publishing Co., St. Paul.

ANDREWS' AMERICAN LAW.

What Blackstone has been to English law, Andrews' great work will be to American law. The author's treatment is elementary, scientific and eminently practical. The citations of the great leading cases where the rules are formulated or expounded with the modern great ruling cases showing the prevailing and conflicting views of the law to which are added such collateral citations as will facilitate the making of exhaustive briefs on the subjects. 5,000 choice cases are cited, judicious reference being made to American Decisions, American Reports, American State Reports, Lawyers' Reports Annotated, English Ruling Cases, and the Reporter system. The author

treats of the development of the science of law and government, representative government in Greece, ancient idea of sovereignty and slavery, Roman jurisprudence, rise of feudalism and Roman hierarchy, analysis of American law, personal relations, rights, obligations and remedies, magistrate and people, the people of the nation, people of the States, public domain, sources of systems of law, national government, partition of powers, powers of congress, national revenue, duties and excise tariff, power to regulate commerce, finance and currency, bankruptcy and insolvency, war and military power, post office, post roads and internal improvements, federal executive authority, State legislative department, State executive department, local self-government, private corporations, personal rights, domestic relations, things of property, things real, law of actions, law of crimes. Measured by a close standard, we have heretofore had no elementary treatise on American law. Investigation fails to discover any institutional work designed for the use of American students, or a declaration and application of the true principles of legal analysis. The proper construction is to divide the body of rules which constitute the *corpus juris* into classes of rules relating to some great subject and to subdivide these into genus and species as explained in chapter 2, page 65, a careful examination of which is made the subject of chapter 3. Legal analysis as there explained, applied to the actual preparation of a discourse or an elementary treatise on law combines two processes—analysis and synthesis. As definition cannot precede a settled form and clear conception of the subject to be defined, so a logical arrangement of a nation's laws cannot precede a settled and well understood development of it. Its development will continue, but its form is fixed. The author thinks that legal analysis in the United States has attained only to the first process of analysis. That analysis has made so little progress is not due to a lack of legal acumen or learning on the part of the legal profession, nor to a lack of that peculiar ability termed analytical. Nor is the reason to be found in the complexity of our dual system of State and national jurisdiction, though the latter may have some bearing on the matter. The above may be termed the natural causes of want of method in our treatises. In addition to these natural causes there is an artificial cause, viz.: to the habits of thought engendered by the universal use of Blackstone's Commentaries as an institutional work for students by which the minds of students have been filled with ideas and principles not at all adapted to, and indeed in direct conflict with the fundamental principles of American law; these impressions cling to them after they become lawyers. Mr. Andrews has certainly devoted an immense amount of painstaking labor to his book. We see no reason why it should not go into universal use and supplant not only Blackstone but all competitors. The author has cited leading and ruling cases, and in addition the best considered and most prominent late cases, giving the preference to such cases as are reported and annotated in standard reports. These citations add much to the value of the book to the practicing lawyer. The author is James DeWitt Andrews, who has heretofore edited Wilson's Works, Andrews' Stephen's Pleading and Cooley's Blackstone. The book contains over 1,300 pages, well printed, as is the custom of the publishers, Callaghan & Co. Chicago.

BOOKS RECEIVED.

The American Digest Annotated, Continuing Without Omission or Duplication, the Century Edition of the American Digest, 1658 to 1896. 1900A. A Digest of All Current Decisions of all the American Courts, as Reported in the National Reporter System, the Official Reports and Elsewhere, Together with Leading English and Canadian Cases, from October 1, 1899, to March 31, 1900. Prepared and Edited by the Editorial Staff of the American Digest System. St. Paul, Minn., West Publishing Co., 1900.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCORD AND SATISFACTION—Consideration for Release of Claim.—Where a debtor, in tendering the amount of a demand which had been liquidated by agreement, attached the condition that the creditors should accept the amount in satisfaction of all claims against him, the creditors, by retaining the money, did not preclude themselves from asserting other claims, as the payment of a liquidated demand is no consideration for the release of other demands.—LOUISVILLE, ETC. RY. V. HELM, Ky., 59 S. W. Rep. 528.

2. ADVERSE POSSESSION — Interruption.—Adverse possession of M is interrupted where, her possession being threatened by a third person, she, without any influence from F, went to F and and stated that her (M's) husband had told her that her house was on the land of F, and asked the protection of his title, and agreed to hold under it.—FREE V. FINE, Tenn., 59 S. W. Rep. 884.

3. ADVERSE POSSESSION — Property Not Inclosed.—Rev. St. art. 3343, provides that peaceable adverse possession of real estate for 10 years shall be a bar to an action to recover the land. Article 3344 provides that

the possession contemplated in the preceding section shall not embrace more than 160 acres, including the improvements, or the number of acres actually inclosed, should the same exceed 160 acres. A person in adverse possession of a 15-acre lot for more than 10 years had inclosed but a small portion of such lot, and the remainder was not used or cultivated by him, although he claimed to be in possession thereof. Held, that he acquired title to the entire lot.—NAVIVEL V. RAYMOND, Tex., 59 S. W. Rep. 811.

4. ALIMONY — Service of Publication.—Service by publication is authorized by section 5048 of the Revised Statutes, in an action by a wife for alimony and support of her child against the husband, who deserted his family and became a non-resident of the State, where the only relief sought is the appropriation of real property of the husband situated in the county where the action is brought to the payment of the amount that should be allowed for such alimony and support. Such an action is substantially one *in rem*, and the court has jurisdiction at its commencement to grant a preliminary injunction preventing the disposition of the property by the defendant pending the suit, and, on completion of the service by publication, to decree the relief sought.—BENNER V. BENNER, Ohio, 58 N. E. Rep. 569.

5. ANIMALS—Dogs — Damages for Injury.—A person bit by the dog of the owner of a house while going by a back way to the back door to visit the servants is not a trespasser, so as to prevent recovery, under Pub. St. ch. 102, § 93, declaring that every owner or keeper of a dog shall forfeit to any person injured by it double the amount of damages sustained.—RILEY V. HARRIS, Mass., 58 N. E. Rep. 584.

6. ATTACHMENT—Mortgaged Property.—An owner of certain land mortgaged the cotton to be raised and gathered by him, assisted by his family and the hired help he might have, thereon during a certain year, to plaintiff; a portion of the land being rented by croppers, who paid a portion of the crop to such mortgagor as rent. Held, that the mortgage did not include the latter cotton, and hence an attachment and sale thereof as belonging to the mortgagor was not wrongful.—BLOUNT V. LEWIS, Tex., 59 S. W. Rep. 293.

7. ATTACHMENT — Non-Residence — Citizenship.—Where defendant, a railroad contractor, retained a house occupied by his father, who was a member of his family, in one State, where his child, a young girl, also lived, and voted there, and returned there several times each year on visits, but all his business was done in another State, where he had an office and living apartments, for the purpose of carrying on such business, with no definite idea of returning to the first State at any particular time, he is a non resident from that State, within the meaning of the attachment laws, though retaining his citizenship, and his property may be attached.—SOUTHERN RY. CO. V. MCDONALD, Tenn., 59 S. W. Rep. 371.

8. ATTACHMENT—Return — Amendment.—Where, in an action for damages for a wrongful attachment, the sheriff's return does not show that the goods levied on belonged to plaintiff, the return on order of the court may be amended by the sheriff, though his term of office has expired.—LAWRENCE V. AGUIRRE, Tex., 59 S. W. Rep. 289.

9. ATTORNEY AND CLIENT — Action for Money Received.—Where a client sues his attorney, and others associated by the attorney with him, for money received, which they failed to pay over, that there was no privity between the client and those employed by the attorney cannot defeat the action, since an action for money received lies against any one who has money which he is not entitled to hold as against the complainant, and want of privity between the parties is immaterial.—MADDEN V. WATTS, S. Car., 37 S. E. Rep. 209.

10. BANKRUPTCY—Setting Aside Assignee's Sale.—Although it satisfactorily appears that a sale of property of bankrupts by an assignee to the wives of the bankrupts, the proceeds being subsequently turned over to the trustee in bankruptcy, is voidable, yet where the property has been resold, and such time has elapsed that it is doubtful whether the setting aside of the sale and the suit for an accounting thereby rendered necessary would result in any benefit to the estate, it will not be set aside at the instance of creditors, unless upon their giving a bond to indemnify the trustee for any loss which may result to the estate.—IN RE FINLAY, U. S. D. C., S. D. (N. Y.), 104 Fed. Rep. 675.

11. BANKRUPTCY — State Law — Proceedings.—Since the statute of Texas concerning assignments for the benefit of creditors is in no sense an insolvent law providing for the discharge of a debtor without the consent of his creditors, but is a statute prescribing a mode of administration of insolvent's estates under assignments which would be good at common law, it does not conflict with the national bankruptcy act of 1898, and hence is not suspended by that act.—PATTY-JOINER & EUBANK CO. V. CUMMINS, Tex., 59 S. W. Rep. 297.

12. BILLS AND NOTES — Collateral Security—Application.—Where plaintiff took notes as collateral security for a note given by defendant under an agreement that he was to exhaust the liability of the makers of the collateral notes before enforcing defendant's liability, such collateral notes, being given at the same time as other notes by the same parties to plaintiff, were of equal dignity with the notes given plaintiff, and the proceeds of the sale of the lands of the makers should be applied *pro rata* to the payment of all the notes, and therefore defendant was entitled to a credit on the note to such *pro rata* amount payable on the collateral notes.—GRAYSON V. HARRISON, Tenn., 59 S. W. Rep. 438.

13. BILLS AND NOTES—Defenses—Collateral Agreement.—The defense that the payee of a note obtained a loan from a bank on the faith of collaterals loaned by defendant, that said note was given on condition that it should not be paid till defendant's collaterals were returned to him, and that they were not returned, but were sold by the bank, was sufficient, as between the parties to the note, though it was not shown what the collaterals were worth or what they sold for; the presumption being that they were at least worth the face of the note.—HAMILTON & MINGO COAL & COKE CO., Tenn., 59 S. W. Rep. 420.

14. BILLS AND NOTES — Directing Verdict.—In an action on a note by a holder who has acquired it before maturity for value, where he established defendant's signature, his ownership, and its non-payment, and that there were no erasures on it, and defendant denied its execution, but only claimed on the trial, without denying his signature, that, if it was the note executed by him, the date had been changed, the issue is for the jury.—FIRST NAT. BANK OF DETROIT V. BOWEN, Mich., 84 N. W. Rep. 289.

15. BUILDING ASSOCIATIONS—Insolvency—Borrowing Member.—Where an action is brought by an insolvent building association, and the receiver thereof, to recover the amount due from a borrowing member, defendant should be charged with the amount of the loan and the interest thereon, and credited with interest and premiums paid by him, but should not be credited for dues paid on his stock.—SOUTHERN BUILDING & LOAN ASSN. V. EASLEY, Tenn., 59 S. W. Rep. 440.

16. CARRIERS—Passenger — Termination of Relation of Carrier and Passenger.—The relation of carrier and passenger between a railroad company and a passenger on one of its trains is not terminated when the passenger alights at a station, until he has had a reasonable time, under all the circumstances, to leave the station; and a woman alighting at a station in the early morning, while it was dark, and who was injured immediately afterwards, by falling from the platform

owing to the darkness, there being no one at the station, and no lights in or around it, is not debarred from recovering for the injury because she had formed the intention of remaining at the station until daylight.—CHICAGO, ETC. RY. CO. v. WOOD, U. S. C. C. of App., Eighth Circuit, 104 Fed. Rep. 662.

17. CARRIERS OF PASSENGERS — Negligence—Street Railways.—The controversy being whether defendant's street-railway train, which ran over plaintiff's intestate as he attempted to board it, was moving slowly, as testified by plaintiff's witnesses, or rapidly, as testified by defendant's witnesses, plaintiff cannot show that it was defendant's custom to stop its cars near the point of the accident to take on passengers; this not being competent to corroborate plaintiff's evidence, and furnishing no excuse for attempting to mount a rapidly moving street car.—WEST CHICAGO ST. R. CO. v. TORPE, Ill., 58 N. E. Rep. 697.

19. CARRIERS OF PASSENGERS — Street Railroads.—If a street car stops at a usual place for passengers, and a person in the exercise of due care gets upon the steps or platform of the car, for the purpose of taking passage, while it is so waiting, he is to be regarded as a passenger.—GAFFNEY v. ST. PAUL CITY RY. CO., Minn., 84 N. W. Rep. 304.

19. CERTIORARI—Jurisdiction.—Where the court had jurisdiction of the subject-matter and of the parties, its action in refusing an injunction and dismissing the action cannot be reviewed by *certiorari*, since the remedy can only be employed to determine whether a tribunal has exceeded its authority.—STATE v. DISTRICT COURT OF SECOND JUDICIAL DISTRICT, Mont., 62 Pac. Rep. 820.

20. CONSTITUTIONAL LAW — Pharmacy Act — Patent Medicines.—Pharmacy Act, § 2, imposes a penalty on any person, not a registered pharmacist, who opens or conducts any pharmacy, dispensary, drug store, etc., for the purpose of retailing, compounding, or dispensing drugs or poisons, unless he shall employ and place in active charge of the same a registered pharmacist, provided that the act shall not interfere with the sale of patent, proprietary, and domestic remedies by retail dealers in localities as thereinafter provided. Section 8 gives the State board of pharmacy power, in its discretion, to issue permits to persons engaged in business in villages, or other localities, to sell domestic and proprietary medicines under such restrictions as it may provide. Held, that so much of this legislation as empowers the board to issue such permits violates Const. art. 4, § 22, prohibiting special laws granting to any person any special or exclusive privilege, since it vests in the board an arbitrary discretion, enabling it to grant or withhold the same privilege from different individuals at its pleasure.—NOEL v. PEOPLE, Ill., 58 N. E. Rep. 617.

21. CONSTITUTIONAL LAW—Tramps—Offenses Against Public Policy.—Section 6996, Rev. St., commonly known as the "Tramp Law," whereby punishment is prescribed for threatening to do injury to the person of another by a tramp, is not in conflict with the Ohio bill of rights, nor with section 26 of article 2 of the constitution, nor with the fourteenth amendment to the constitution of the United States. — STATE v. HOGAN, Ohio, 58 N. E. Rep. 572.

22. CORPORATIONS—Authority of Officer—Estoppel.—A corporation pledged certain warehouse receipts to secure its loan to a bank. After payment of all but $1,000, its treasurer and general manager, who was largely indebted to the same bank, informed it that, as the corporation owed him more than that amount, he had made arrangements with the corporation to pledge such receipts to secure his individual loan. The bank accepted the receipts, and thereafter, on its request, they were indorsed in blank by the secretary, who was the son of the manager. The corporation thereafter paid its loan without taking up the receipts. The representation of the manager as to the debt due him was in fact false. Held, that, treating the pledge for the debt of the manager as the act of the corporation, it was *ultra vires* and void, and incapable of ratification.—WHEELER v. HOME SAVINGS & STATE BANK, Ill., 58 N. E. Rep. 598.

23. CORPORATIONS — Contract — Defaulting Contractors.—A corporation is not legally or equitably bound to pay the creditors of its defaulting contractors for work, materials, or supplies, which creditors furnished to such contractors, and the latter used to improve the property of the corporation, when the contractors have so utterly failed to perform their agreement with the corporation that it owes them nothing. — DENISON & N. RY. CO. v. RANNEY-ALTON MERCANTILE CO., U. S. C. C. of App., Eighth Circuit, 104 Fed. Rep. 595.

24. CORPORATIONS—Foreign Corporations — Service of Process.—Under Code Civ. Proc. Cal. § 411, which authorizes service of process on foreign corporations "doing business and having a managing or business agent, cashier or secretary within this State," by service on such agent, cashier, or secretary, to render such service effective, where made on a person as the business agent of a foreign corporation, the corporation must be in fact doing a substantial part of its business within the State, so as to be subject to the statute, and the agent must be one having actual derivative authority bearing a close relation to that of managing agent, cashier or secretary, and not merely an agency created by construction or implication, contrary to the intention of the parties.—DOE v. SPRINGFIELD BOILER & MFG. CO., U. S. C. C. of App., Ninth Circuit, 104 Fed. Rep. 684.

25. CORPORATIONS—Insolvent Corporations — Creditors' Suits.—A creditor of a corporation who has exhausted his remedy at law can proceed, in order to obtain satisfaction of his judgment, against a stockholder to enforce the latter's liability to the company for his unpaid subscription, though the other stockholders are not made parties, and no account is taken of the other indebtedness of the corporation.—COOPER v. ADEL SECURITY CO., N. Car., 37 S. E. Rep. 216.

26. CORPORATIONS—Minority Stockholders. — Where a mining corporation purchases a majority of the stock of another mining corporation, and by so doing is able to elect a directory under its control, and secure a bond and lease of the property of such corporation on its own terms and conditions, such lease and bond will be set aside at the suit of minority stockholders of the latter corporation, though obtained without any actual fraud.—GLENGARY CONSOL. MIN. CO. v. BOEHMER, Colo., 62 Pac. Rep. 889.

27. CORPORATIONS—Mortgages—Validity.—The validity of a company's mortgage given to secure money loaned to it is not affected because the instrument shows no authority of the officials to borrow the money to secure which it was executed; for such authority will be presumed, in favor of the lender, where the company received the money.—TURNER v. KINGSTON LUMBER & MFG. CO., Tenn., 59 S. W. Rep. 410.

28. CORPORATIONS—Religious Meetings—Leases—Covenant.—When a corporation, which has for its object the owning and holding of land for the purpose of carrying on religious exercises and meetings on the same, leases a part of such land with restrictive covenants in the lease that the lessees "during all meetings would be subject to the rules and regulations of said meeting," and "would use such premises for the purpose of a private dwelling or residence only, except on a special permit from the company," such covenants are valid, and binding on the lessees.—LINWOOD PARK CO. v. VAN DUSEN, Ohio, 58 N. E. Rep. 576.

29. CORPORATIONS— Service of Process — Managing Agent.—Where a foreign corporation had ceased to do business in the State, an attorney who, as general counsel, had charge of all the business of the company in the State, and who was its only general officer in the State, was "the managing agent" of the corporation within the meaning of Civ. Code Prac. § 732,

subsec. 33, providing that "the managing agent" of a corporation shall be deemed its "chief officer," for the purpose of service of process, where the corporation has no one of several other officers in the State.—NEWPORT NEWS & MISSISSIPPI VAL. CO. v. MCDONALD BRICK CO.'S ASSIGNEE, Ky., 59 S. W. Rep. 832.

30. CORPORATIONS—Stockholder's Liability—Enforcement.—Laws Kan. 1898, ch. 110, which provides for the enforcement of the constitutional liability of stockholders in a corporation by a receiver for the benefit of the corporation and all the creditors alike, does not supersede the provisions of the prior statute, which gave a creditor the right to enforce the liability of any particular stockholder for his own individual benefit, as to contracts made while such statute was in force, since the right thereby given became a part of the contract, which would be materially impaired by the substitution of the restricted remedy given by the subsequent act. — WEBSTER v. BOWERS, U. S. C. C., D. (N. H.), 104 Fed. Rep. 627.

31. CREDITORS' BILL—Execution Sale.—A judgment creditor, after an execution has been issued and returned *nulla bona*, may maintain a suit in equity to make his judgment effective as a lien upon land, by removing obstructions calculated to make an execution sale unproductive.— FIRST NAT. BANK OF PLATTSMOUTH v. GIBSON, Neb., 84 N. W. Rep. 259.

32. CRIMINAL EVIDENCE—Bigamy.—Under Pen. Code § 1106, providing that on a trial for bigamy it is not necessary to prove either of the marriages by the register, but the same may be proved by such evidence as is admissible to prove a marriage in other cases, testimony tending to show that defendant and the woman alleged to be his first wife were generally reputed to be husband and wife in the communities where they lived is admissible.—PEOPLE v. HARTMAN, Cal., 62 Pac. Rep. 823.

33. CRIMINAL LAW —Amendment of Bill of Exceptions.—The trial court may alter, change or strike out a bill of exceptions in a criminal case during the term at which the matters occurred, after notice to both sides, where necessary to show the truth.—CAIN v. STATE, Tex., 59 S. W. Rep. 275.

34. CRIMINAL LAW—Chattel Mortgages—Sale of Property.—In a prosecution for selling mortgaged personal property, an erroneous refusal to instruct that if, at the time of the sale, the debt was unpaid, but the purchaser agreed to secure payment of the debt, and if defendant sold the property in good faith, without fraudulent intent, he should be acquitted, is not remedied by a subsequent instruction that did not clearly present the issue on the facts.—SWEAT v. STATE, Tex., 59 S. W. Rep. 265.

35. CRIMINAL LAW—Discharge of Jury—Former Jeopardy.—A discharge of a jury without accused's consent for failure to agree in a criminal case, after they have remained out during an entire night, is no bar to further proceedings, and gives the prisoner no right of exemption from being again put on trial for the same offense.—DREYER v. PEOPLE, Ill., 58 N. E. Rep. 620.

36. DEEDS—Acknowledgment—Execution.—The probate and registration of a deed were invalid as to the grantor where the officer taking the acknowledgment and privy examination of the grantor's wife failed to enter any acknowledgment by the grantor.—HATCHER v. HATCHER, N. Car., 37 S. E. Rep. 207.

37. DEEDS—Estates Conveyed—Adopted Children.—Hurd's Rev. St. ch. 4, § 5, provides that an adopted child shall be regarded as if it had been born in lawful wedlock, for the purposes of inheritance, "and other legal consequences and incidents of the natural relation of parents and children." A deed from B to his daughter conveyed to her a life estate, with remainder to her child or children, and in default thereof to her "heirs generally," forever. The daughter died without children, except an adopted son. Held, that such adopted son would take the fee-simple, under the term "heirs generally," in preference to the collateral heirs of the daughter.—BUTTERFIELD v. SAWYER, Ill., 58 N. E. Rep. 602.

38. DEEDS—Fee-Simple Estate.—A deed from a father to his married daughter recited that the grantor conveyed certain real estate to the grantee and the heirs of her body by her then husband, in consideration of natural love and affection. Held, that such deed vested a title in fee-simple in the grantee, and not a mere life estate.—CALDER v. DAVIDSON, Tex., 59 S. W. Rep. 300.

39. DOWER — Antenuptial Conveyance — Fraud.—Where decedent immediately before his marriage with plaintiff conveyed his homestead to others without consideration, and with the express intention of defeating plaintiff's dower right, the conveyance was fraudulent, and her right attached, notwithstanding Rev. St. 1899, § 2983, limits dower to lands whereof the husband was seised during coverture.—HACH v. ROLLINS, Mo., 59 S. W. Rep. 282.

40. ELECTIONS—Ballot—Party Designations.—Where several political parties have united in making a nomination for office, and the name "Fusion" has not been adopted by either of such parties, although the combination has been usually known as the "Fusion Party," and other nominations have been made by other combinations of political parties, the nominees of neither combination have the right to have their names placed on the official ballot under the party designation of "Fusion."—BECKWITH v. WINTERS, Colo., 62 Pac. Rep. 835.

41. ELECTIONS—Conventions—Regularity.—Where a convention of a judicial district has been regularly called by the district committee, and the unchallenged delegates elected under such call, though a minority of the whole number of delegates, met and effected a temporary organization, and seated one of two contesting delegations, such convention is the regular convention; and hence its nominee is the regular nominee, and entitled to be certified as such by the secretary of state.—BECKWITH v. RUCKER, Colo., 62 Pac. Rep. 835.

42. EQUITY—Power of Court to Modify Decree.—While a court is without power to modify a final decree after the term at which it is entered, in so far as determines the rights of the parties, it retains jurisdiction to make further orders directing the manner of its execution, and to that extent it may modify the provisions of the original decree, as by changing the time or term of a sale of property necessary to carry a decree of partition into effect.—MOOTRY v. GRAYSON, U. S. C. C. of App., Ninth Circuit, 104 Fed. Rep. 618.

43. EVIDENCE—Parol Evidence.—Parol evidence cannot be received to show that at the time of sale of personalty for which a note was given the parties verbally agreed that the title should remain in the vendor until payment of the price, and, if the price was not paid, it was the understanding that rent was to be paid for the property.—FELD v. STEWART, Miss., 28 South. Rep. 819.

44. EVIDENCE — Parol Evidence—Deed.—Parol evidence is admissible to show that at the time of the execution of a deed it was agreed that the grantee assumed payment of notes charged on the premises, though the deed contains a covenant against incumbrance, since such agreement is a portion of the consideration of the deed, and evidence thereof does not vary the terms of the written contract.—JOHNSON v. ELMEN, Tex., 59 S. W. Rep. 253.

45. FEDERAL COURTS—Injunctions—Motion to Dissolve—Interlocutory Order.—A circuit judge will not grant a motion to dissolve an interlocutory injunction granted by a district judge sitting in a circuit court, where it can be made before the same judge who made the order.—IDE v. CROSBY, U. S. C. C., N. D. (Ala.), 104 Fed. Rep. 582.

46. FEDERAL COURTS — Surgical Examination of Party.—Under Rev. St. § 721, providing that the laws of the several States shall be rules of decision in trials at common law in the courts of the United States in cases to which they apply, except where the constitution, treaties, or statutes of the United States otherwise provide, in an action for a personal injury in a federal court in New Jersey the defendant is entitled to an order requiring the plaintiff to submit to a surgical examination, as provided by the laws of the State.—CAMDEN & S. RY. CO. v. STETSON, U. S. C. C. of App., Third Circuit, 104 Fed. Rep. 651.

47. GUARDIAN AND WARD—Action on Bond.—A guardian's bond, payable to the county judge, conditioned for the faithful performance of his duties as guardian and appearing to be the bond of the guardian of certain minors, is a sufficient bond, and properly received in evidence in an action by such minors against the sureties.—FAHEY v. BOULMAY, Tex., 59 S. W. Rep. 800.

48. GUARDIAN AND WARD—Guardian's Bond.—Surety on a guardian's bond served notice on the guardian that he would move the county court to release him from such bond on a certain day, which he did, whereupon the court entered an order directing such release, and that notice issue to the guardian to give a new bond. Thereafter the guardian voluntarily appeared, and gave bond, which was accepted by the court, and the surety was released from subsequent liability. Held, that the fact that such surety did not present a formal petition to be released did not render the court's action void, all the proceedings being in open court.—REED v. DUNCAN, Tenn., 59 S. W. Rep. 402.

49. INDEMNITY—Discharge of Indemnitors.—A notice to an indemnitor to appear and defend an action on which his liability depends gives him the right to use all means of defense which would be open to him had he been made a party, including the right to prosecute an appeal or writ of error; and where indemnitors served with such notice employed counsel and contested the case, and after an adverse judgment sued out a writ of error and prepared the case for hearing in the appellate court, the action of the defendant in paying the judgment on the day set for such hearing, without the knowledge or consent of the indemnitors, not only rendered it ineffective as an adjudication against them, but, under the circumstances, which showed bad faith on the part of the defendant, operated to discharge them from liability on their undertaking.—AMER. SURETY CO. OF NEW YORK v. BALLMAN, U. S. C. C., E. D (Mo.), 104 Fed. Rep. 634.

50. LIBEL—Privileged Communication.—In an action for libel,—the alleged libel being a publication in defendant's newspaper of charges that plaintiff had been guilty of improper conduct when city treasurer, at a time when he was candidate for mayor,—it was a proper instruction that the question of the fitness of a candidate for office was a subject for the freest scrutiny; that much latitude was allowed in publication of information to voters of charges affecting the candidate's fitness; that such publication was not actionable, without proof of express malice, though unjust and too severe; but that an attack on the character of a candidate, falsely charging him with a crime not affecting his fitness for the office for which he was running, was not privileged, and malice would be implied from the publication, since plaintiff's conduct as treasurer might properly be shown to the voters as affecting his fitness to be mayor.—MYERS v. LONGSTAFF, S. Dak., 84 N. W. Rep. 238.

51. LIFE INSURANCE — Forfeiture of Policy—Reinstatement of Policy.—Where insured under a life policy forfeits the policy by non-payment of assessments, which he afterwards pays, and receives a receipt that it is only taken on condition that he is in good health, and he is in bad health, and it also provides that the receipt of future assessments by the insurer shall not be considered a waiver of the condition of such receipt, the receipt of a future assessment does not reinstate the policy.—MUTUAL RESERVE FUND LIFE ASSN. v. LOVENBERG, Tex., 59 S. W. Rep. 814.

52. LIMITATIONS — Action on Certificate of Deposit.—Limitations only begin to run on a certificate of deposit when there is an actual demand of payment in due form, and such demand must precede an action thereon.—TOBIN v. MCKINNEY, S. Dak., 84 N. W. Rep. 228.

53. LIMITATIONS—Appeal.—Where the defense of the statute of limitation is relied upon, if the jury are properly instructed as to the law this defense is a question of fact for the jury to determine; and, when the evidence on this point reasonably sustains the verdict of the jury, this court will not disturb the verdict. —HIGGINS v. BUTLER, Okla., 62 Pac. Rep. 811.

54. MARRIAGE — Impediments — Cohabitation—Consent.—Decedent took out a certificate in an insurance association for the benefit of an alleged wife, he having previously married another, against whom he instituted divorce proceedings; but it does not appear that a divorce was granted. After this he cohabited with the alleged wife, and they held each other out and were recognized by neighbors as husband and wife, and this continued after the death of the former wife, which occurred prior to his taking out the certificate, the alleged wife not knowing of any impediment to the marriage till after decedent's death. Held, that the facts were sufficient to show a marriage by consent, and hence the alleged wife was entitled to the benefits under the certificate, as against decedent's brothers and sisters, claiming as his beneficiaries.—BARKER v. VALENTINE, Mich., 84 N. W. Rep. 297.

55. MASTER AND SERVANT — Appliances — Railroad Track—Presumptions.—Where a railroad company admits that it knew its track was not in safe condition at the point where an employee was injured by the derailment of a hand car, it will be presumed that the company's negligence in failing to maintain a safe track was the cause of the injury, and the burden is cast on the company to show that the accident was not caused by its negligence.—WILKIE v. RALEIGH & C. F. R. CO., N. Car., 37 S. E. Rep. 204.

56. MASTER AND SERVANT—Personal Injuries—Unsafe Appliances.—Where an employee complained of an appliance as unsafe, and was told that he might either continue to use it or leave, and he continued thereafter to use the same, rather than lose his place, he will be held to have assumed the risk, and cannot recover for resulting injuries.—JAMSON v. AMER. AX & TOOL CO., Mass., 58 N. E. Rep. 585.

57. MORTGAGES—Assignment — Failure to Record.—Where mortgagors constitute the mortgagee their agent to negotiate the mortgage note and to transfer the mortgage, they cannot complain that the transfer was not recorded, so as to entitle them to credit on the mortgage, as against the transferee, for an amount paid to the mortgagee after the transfer, since the act of the mortgagee in transferring the mortgage was the act of the mortgagors.—BACON v. WOOD, R. I., 47 Atl. Rep. 388.

58. MORTGAGES — Deed — Contemporaneous Agreement.—Where a mortgagor quitclaims premises to the mortgagee, and they enter into an agreement whereby the mortgagor is to purchase and the mortgagee to sell on payment of a certain sum on or before a certain date, time being expressly stipulated as the essence of the contract, failure to pay the agreed sum at the specified time precludes the mortgagor from redeeming or purchasing thereafter, since the relation of mortgagor and mortgagee ceased on giving the deed and entering into the contract.—TRIPLER v. CAMPBELL, R. I., 47 Atl. Rep. 385.

59. MORTGAGES—Judgments — Record.—A mortgagee is not chargeable with constructive notice of the equitable title of others in the premises by reason of recitals in a judgment obtained by mortgagor's grantor which would indicate that mortgagor had received the legal title as trustee, where mortgagor's legal title is com-

plete, and in no way depends on such judgment.—RAMIREZ V. SMITH, Tex., 59 S. W. Rep. 358.

60. MORTGAGES—Release—Mistake of Fact.—One who fails, through culpable inertness, to make inquiry when it is his duty to inquire, and by reason of such failure loses a valuable right, is not entitled to relief in equity on the ground of mistake.—FARRELL V. BOUCK, Neb., 84 N. W. Rep. 260.

61. MORTGAGE BY WIFE—Extension of Time.—Where a wife executes a mortgage on her property to secure the husband's antecedent debt, and the husband secures an extension of time for payment without the wife's consent, such extension discharges the mortgage, the wife occupying the position of surety, though the agreement for it was on a usurious consideration.—FLEMING V. BORDEN, N. Car., 37 S. E. Rep. 219.

62. MORTGAGE TO INDEMNIFY SURETY.—A mortgage executed by the principal in a note to the sureties therein to save them "harmless in said suretyship" continued in force to indemnify the sureties against loss on account of the execution by the same obligors of a new note to raise money to pay off the note described in the mortgage.—JARBOE V. SHIVELEY, Ky., 59 S. W. Rep. 326.

63. MUNICIPAL CORPORATIONS — Construction and Maintenance of Streets and Sidewalks.—The statute requires of municipalities the exercise of ordinary care in the construction and maintenance of streets and sidewalks; but that duty is not violated by permitting a carriage block of the usual size to occupy the usual position of such blocks, near the curb, and not upon that portion of the sidewalk which is designed for the use of pedestrians going upon, or passing along, the walk.—CITY OF CINCINNATI V. FLEISCHER, Ohio, 58 N. E. Rep. 568.

64. MUNICIPAL CORPORATIONS—Contracts.—By a contract between a water company and a city, the company was required to sluice the gutters in the city without charge. The city subsequently constructed on some streets what were termed "sanitary sewers," which to some extent, at least, served the purpose of gutters; and the company, on its request, flushed such sewers without charge for a period of nine years, and until a change in its management. Held, that such action constituted a practical construction of the contract by the parties as including such sewers under the term "gutters," and precluded any recovery by the company for flushing the same.—STATE TRUST CO. OF NEW YORK V. CITY OF DULUTH, U. S. C. C., D. (Minn.) Fifth Division. 104 Fed. Rep. 632.

65. MUNICIPAL CORPORATIONS—Damages — Grade of Street.—Under Const. 1879, art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation being made to the owner, a municipal corporation is liable to the owner of an abutting lot for damages caused by the excavation of a street.—EACHUS V. CITY OF LOS ANGELES, Cal., 62 Pac. Rep. 829.

66. MUNICIPAL CORPORATIONS—Improvement of Street —Assessments—Estoppel.—Where a city council, in ordering a street improvement, directed that it should be paid for out of the general fund, the fact that property owners benefited by the improvement stood by and permitted the work to be done without objection did not estop them from contesting the validity of an assessment assessing the cost of the improvement against the property benefited, thereafter made by the council, since they had a right to rely on the resolution as to the manner of payment.—SPAULDING V. BAXTER, Ind., 58 N. E. Rep. 551.

67. MUNICIPAL CORPORATIONS — Negligence — Complaint.—Where plaintiff's complaint alleged that, while driving carefully, in the nighttime, she was thrown from her vehicle and injured, owing to the wheels catching in an opening in a culvert in the street, and that complainant was not aware of the condition of the culvert, but that it was known to the town, the defective condition of the culvert, the absence of knowledge on the part of the plaintiff, and the knowledge of the defendant being alleged, the complaint stated a cause of action.—TOWN OF ODON V. DOBBS, Ind., 58 N. E. Rep. 862.

68. MUNICIPAL CORPORATION—Ordinances—Taxation of Transient Merchants.—A city ordinance which provided a fine for any person keeping a store or selling goods without a license, but which excepted from its operation merchants or other persons selling goods who paid an annual tax on such goods under the revenue laws of such city, also traveling agents selling exclusively by sample or otherwise to regular merchants doing business in the city, is void, as in restraint of interstate commerce.—STATE V. WILLINGHAM, Wyo., 62 Pac. Rep. 797.

69. PHYSICIANS — Practicing Without License—Osteopathy.—In construing statutes effect should be given to the intention of the legislature. One who practices what is known as "osteopathy" without obtaining a certificate from the State board of health is a practitioner of medicine as defined by article 1, ch. 55, Comp. St., and is liable to the penalty prescribed specifically for practicing medicine without a license.—LITTLE V. STATE, Neb., 84 N. W. Rep. 249.

70. RAILROADS—Fires — Negligence.—Where a fire is negligently caused by sparks from a locomotive, the railroad company is liable for damages to property which does not adjoin its right of way, and to which the fire is transmitted after it has burned its way through the adjoining property.—ALABAMA & V. RY. CO. V. BARRETT, Miss., 28 South. Rep. 821.

71. RAILROAD COMPANY—Actions by Tenants—Cattle Guards.—Under Code, § 3561, providing a penalty against railroads for failure to construct stock gaps and cattle guards, recoverable by persons interested, a lessee may sue a company, the tracks of which enter his land, for the penalty and damages caused by failure to construct stock gaps and cattle guards, though his land is not separately inclosed, since a tenant owns his land for his term.—YAZOO & M. V. R. CO. V. YOUNG Miss., 28 South. Rep. 826.

72. REMOVAL OF CAUSES—Joint Action Against Employer and Employees.—An action against a railroad company and two of its employees, charging them with concurrent negligence in killing a person at a railroad crossing, is joint, and not several, and therefore cannot be removed into a federal court by the railroad company on the ground of diverse citizenship, when the employees are citizens of the same State as the plaintiff.—CHESAPEAKE & OHIO RY. CO. V. DIXON, U. S. S. C., 21 Sup. Ct. Rep. 67.

73. REMOVAL OF CAUSES—Suit Against Citizen and Alien.—In a suit by a plaintiff, who is a citizen of the State where it is brought, against two defendants, the fact that one of the defendants is a citizen of a different State, and the other an alien, does not deprive a federal court of jurisdiction, or prevent a removal of the suit from a State court, where either defendant would have a right to remove it if sued alone, and when they unite in petitioning for removal.—ROBERTS V. PACIFIC & A. RY. & NAV. CO., U. S. C. C., D. (Wash.), 104 Fed. Rep. 577.

74. RES ADJUDICATA — Judgment.—Where, in an action on a coupon note for interest, the question whether the terms of a power of attorney were broad enough to warrant the attorney in fact, who, on behalf of the makers, executed the note for the principal, the coupon notes for the interest, and a mortgage securing them, to borrow money, and to execute these instruments for his principal, and the question whether or not the certificate of acknowledgment on the letter of attorney was in legal form, were actually litigated and decided, and a judgment was rendered against the grantors in the letter of attorney, held, that in a subsequent action between the same parties on the note for the principal, or on other coupon notes for interest, and on the mortgage, these questions were *res ad*

judicata, and could not be again litigated.—LINTON v. NAT. LIFE INS. CO. OF VERMONT, U. S. C. C. of App., Eighth Circuit, 104 Fed. Rep. 584.

75. SALES—Breach of Warranty—Damages.—Where a seller of certain seed rice guaranties that it will grow, but it fails to do so, and it is too late to plant another crop after its worthlessness is discovered, the buyer's measure of damages is the amount paid for the rice, in preparing the soil for the seed, and for planting the same, and also a reasonable rent for the land for the year, less the amount for which he could have rented the land to be put in crops other than rice after it was too late to sow the same.—REIGER v. WORTH CO., N. Car., 37 S. E. Rep. 217.

76. SALES—Contract — Rescission.—Where a vendor rescinds a contract of sale, which rescission is acquiesced in by the vendee, the terms of the contract being incomplete and the vendee not being in default, the latter is entitled to be placed *in statu quo*.—FLEMING v. HANLEY, R. I., 47 Atl. Rep. 887.

77. SALE—Retention of Title.—One who sells a chattel, retaining title till the purchase money is paid, does not devest himself of the title by also taking personal security on the purchase money note.—OWENBY v. SWANN, Tenn., 59 S. W. Rep. 378.

78. SHERIFF—Liability for Death of Prisoner.—Letters of administration should be granted, if there be no tangible assets, where it appears that the estate has a right of action. A sheriff is liable on his official bond for any injuries resulting to a prisoner, while in his custody, through his negligence.—APPEAL OF JENKINS, Ind., 58 N. E. Rep. 560.

79. SPECIFIC PERFORMANCE—Oral Contract—Part Performance.—An agreement of a father to give his farm to his sons if they would move onto it, cultivate and improve it, and furnish him a home with them, will be enforced, they having done their part, though he, without sufficient cause, went away.—CLANCY v. FLUSKY, Ill., 58 N. E. Rep. 594.

80. SPECIFIC PERFORMANCE—Order of Proof—Evidence.—Under Hill's Ann. Laws, § 830, declaring that the order of proof in an action shall be in the discretion of the court, in a suit for the specific performance of a parol contract to convey land, executed on complainant's part, the admission of evidence of the agreement before proof of complainant's performance was not error, on the ground that, in view of the statute of frauds, proof of the part performance before proof of the contract was jurisdictional.—BARRETT v. SCHLEICH, Oreg., 62 Pac. Rep. 792.

81. STATUTES — Validity. — One cannot successfully rely upon a statute when he, at the same time, insists that a material portion thereof is unconstitutional, where it is obvious that the part claimed to be invalid formed an inducement for the passage of the remainder.—CRAWFORD CO. v. HATHAWAY, Neb., 84 N. W. Rep. 271.

82. TAXATION—License—Ditch.—The fact that defendant's grantors silently acquiesced in the construction by plaintiff, at considerable expense, of an irrigating ditch across their lands, did not estop defendant, prior to the expiration of the period of limitation, from cutting off the supply of water, plaintiff's right being a bare license, revokable at will.—EWING v. RHEA, Oreg., 62 Pac. Rep. 790.

83. TAXATION—Injunction.—A court of equity will not enjoin the collection of any portion of a tax unless the petitioner tenders that portion over which there is no dispute, if there be any, and offers in his petition to pay such further portions thereof as the court may find to be just.—LASATER v. GREEN, Okla., 62 Pac. Rep. 816.

84. TAXATION—Riparian Rights — Exemptions. — Riparian rights are mere incidents to and a part of the abutting shore property, are inseparable therefrom except at the instance and by the act of the owner, and, until so separated by him, not subject to taxation independent from the shore property to which they so belong.—IN RE DELINQUENT TAXES, Minn., 84 N. W. Rep. 802.

85. TAX LIENS—Priority—Mistake.—Where A, acting for N, the second mortgagee of lands, took up tax certificates therefor, and entered into an agreement with B, trustee in the first mortgage, giving him an option to purchase them, and thereafter, without any authority, and without consideration, surrendered them to B, both erroneously thinking they had become void, the second mortgagee is entitled to have them returned to A, and treated as having remained in his hands, and declared a lien prior to the first mortgage.—NETTERSTROM v. KEMEYS, Ill., 58 N. E. Rep. 609.

86. TRUSTS—Purchase of Trust Property by Trustee. —Where an administrator purchased his intestate's land at a sale made in a suit brought by him to settle the estate, a constructive trust will not be adjudged in favor of the heirs, who did not question the validity of the sale until about 30 years after it was made, and until 13 years after the youngest heir arrived at age.—JOHNSON v. POFF, Ky., 59 S. W. Rep. 325.

87. VENDOR AND PURCHASER—Rescission.—Where the purchaser, though aware of the defects in the vendor's title, agreed to take it, and look to the warranty, he cannot have a rescission of the contract.—RUSSELL v. HANDY, Ky., 59 S. W. Rep. 320.

88. WATERS — Navigable Waters — Bridges. — Authority given a railroad company by its charter to build bridges does not authorize it to build bridges over navigable streams at such a height as to interfere with navigation, and in an action against a railroad company for damages resulting to plaintiff by reason of his steamer having been delayed owing to defendant's having erected over the stream a bridge at such a height as to prevent the passage of the steamer, the defendant could not show a right to maintain the bridge at such height by prescription, under a plea of general issue.—SOUTHERN RY. CO. v. FERGUSON, Tenn., 59 S. W. Rep. 343.

89. WILLS—Revocation.—Conveyance of all of one's property revokes a previous will disposing of the same property. The statute (Comp. Laws 1897, § 9324) prescribing who shall be appointed administrator of the estate of a deceased person applies to the situation at the time letters of administration are granted, and not to the situation at the time of the death of the deceased.—IN RE SPRAGUE'S ESTATE, Mich., 84 N. W. Rep. 293.

90. WILLS—Rights of Legatees.—Under a will directing that a legatee's share shall be paid him on his majority, except interest, which may be paid him annually, and that on his death before reaching his majority his share shall revert to testator's estate, an heir of such legatee, dying before attaining his majority, cannot recover from his guardian interest which has been consumed in his ward's necessities, nor an amount paid to him as principal of such legacy, as the principal reverted to testator's estate. —HARPER v. LOVELL, Tenn., 59 S. W. Rep. 337.

91. WILLS—Witnesses — Request to Sign. — Where testator dictated his will, knowing that witnesses were waiting outside, and were called for that purpose, and signed it in their presence, and they, at the request of the draftsman, signed it at a table four or five feet from testator, in his presence and the presence of each other, there was a sufficient request by testator to the witnesses to attest his will, though there was no formal verbal request by him that they do so.—MARTIN v. BOWDERN, Mo., 59 S. W. Rep. 227.

92. WITNESSES—Communications Between Husband and Wife.—In an action against a wife for divorce, for desertion, the husband cannot testify as to a private conversation between them in which he requested her to return home, though the conversation explained the wife's act in going away, and her mental attitude in the act.—FULLER v. FULLER, Mass., 58 N. E. Rep. 588.